

CASES

IN

PARLIAMENT

Resolved and Adjudged,

UPON

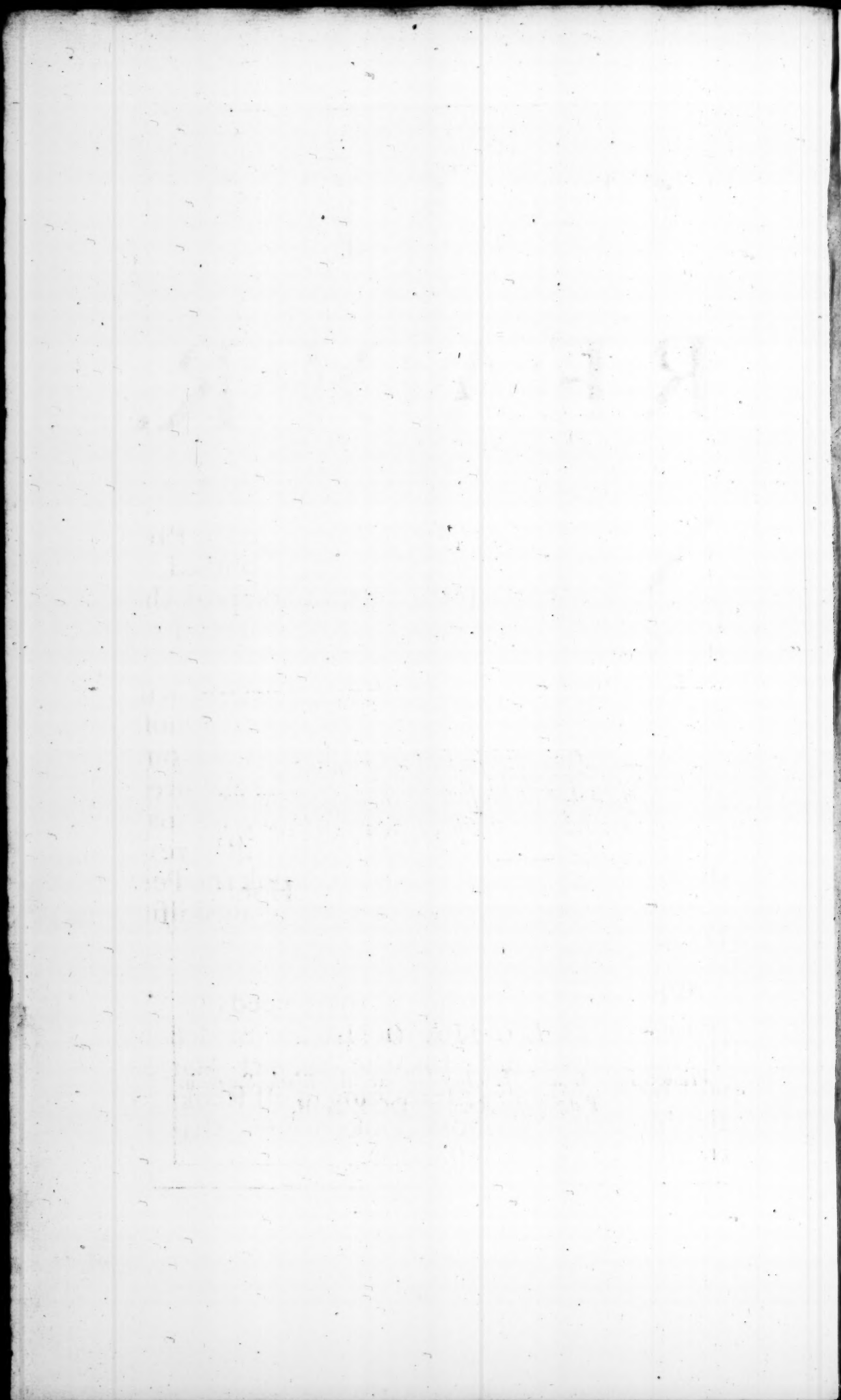
Petitions, and Writs of Error.

— *Quicquid sum Ego, quamvis
Infra Lucili censum ingeniumq; tamen me
Cum Magnis vixisse, invito fatebitur usq;
Invidia* —

Horat.

L O N D O N:

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TO THE
READER.

NO Collection of Cases adjudged in Parliament having been yet published, a Preface seems necessary to bespeak the Reception of that which is now presented to the World.

To commend or excuse the Collector, will not perhaps be a method to introduce it most to advantage: what may be spoken in favour of his diligence or capacity, will be censured vain, and if any excuse be offered for his inability to have done it better, some will be ready to take him at his word, and think the Performance comes from a careless or unskilful Hand.

Whatever the Author is, there needs no Apology to be made for the nature or design of the Work it self; for the Subject Matter will be useful and entertaining to all Ranks of English Men, to whom Books are so; that is, to all such as understand and love Literature.
Here

To the READER.

Here is our Municipal Law, and the reason of it, Equity and the Law of Nations interspersed; here is the manner of arguing, and the language of the Bar briefly toucht; here are the Forms of Proceedings sometimes mentioned, but then again those Forms are superseded by the Original and Eternal Rules of Justice.

By the Debates and Arguments here reported, you may be acquainted in some measure with the Rights of the Peers, and their incapacity to alien such their Rights; with the nature of Slander, and some Rules concerning it; the Course of Equity in respect of Penalties and Costs.

The Law of Average in the Case of Partial Losses at Sea; the Circumstances upon which Relief may be had in Equity against hard or unreasonable Agreements; the Construction of Wills to charitable Uses, where the Estate intended is greater in value, than the particular Bequests amounts unto; the Power of a Council of State to commit; with variety of Matter concerning Pleading; and the Plantations belonging to *England*; and the Privileges and Birthrights of the English Subject by the Common Law, and how far that Law extends.

The nature of Colledges, Hospitals, and other Elemosynary Foundations, and the Authority and Power of Visitors, and the Methods of their Proceedings; the Court of Chivalry

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Chivalry or Honour, the extent and boundaries of its Jurisdiction, before whom held, and when and in what Cases a Prohibition lyes to it; the power of Lords of Copyhold Manors to refuse Petitions for the Reversal of Recoveries in their Courts, and the Judgment of Equity upon such occasions; the right of Dower, and the efficacy of a Term attending the Inheritance to prevent its enjoyment, and the opinion of Equity thereupon.

The Preference of an Outlawry upon mesne Process to a Judgment not extended, and the practise and reason of the practise of the Court of Exchequer in that case; the Consideration which a Court of Equity ought to have of Bonds, Bills, or Promises made or given upon Condition or Consideration of promoting and procuring Matches.

The dependency which Ireland hath upon *England*, and her subordination to it, and the Authority of the House of Peers in This, over the Proceedings in the Chancery of That Kingdom; the opinion of Equity upon Conditional Limitations, and what will be a Performance of such Conditions, and to whom the Profits shall go during the intermediate time, &c.

The qualification requisite in a Presentee to a Benefice, and the power of the Ordinary to refuse for defect of Knowledge, and how that defect is to be tried; the Construction of Law upon a Deed leading the Uses
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of a Fine of the Wives Land to the Heirs of the Husband's Body, the Husband dying afterwards before the Wife; the right of the half Blood, in the distribution of an Intestates Estate, and unto what Share; the right of nominating to the Office of chief Clerk for inrolling of Pleas in B.R. and to whom it belongs; the nature of a Bill of Exceptions, and the Proceedings thereupon, and in what Cases the same may be refused, and if any Authority in the Lords over the Judges in case of such refusal.

The Punishment of Treason by the English Laws, and the Form of Judgments in that case; the nature of contingent Limitations after a Fee, and if they may be allowed upon Contingencies to happen at any time after the decease of Persons then in being; the manner of declaring the Uses of a Fine; and by what Deed or Writing; the nature of Wills, and of the revocations of them, and if a Will, whereof the Contents are unknown, may revoke a former; the efficacy of the acts of one that is *Non compos mentis*; and if, and how far void; what Deeds altering the Estate of a Testator, shall revoke a solemn Will.

The nature of the Office of a Clerk of the Peace, and by whom grantable, and for what Interest, and how removeable; the Prerogative of Presenting to Benefices made void by Promotion, and if such Prerogative be served or fulfilled by a Commendam; and whether

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whether it can operate upon a new created Parish or Rectory; the formal reason and essence of Treason, and wherein it consists, and what is necessary to be alledged in Indictments for that Offence; the right of Tythes for Herbage or Agistment of Cattle grazed and fed for Sale, tho' formerly used to the Plough.

The Exposition of a Will of a Native of *France*, and by what measures a Judgment ought to be made of the meaning of Phrases used by such Persons, in that Language, upon such an occasion; the Construction of the word *Share* in a Will, concerning the New-River Water; the force or validity of a Grant or Assignment of Land (in which the Grantor had a very long term) to hold from and after the Grantor's decease; the Title of Knight, if, and how, part of the Name, and what Allegations in a Count in a *Quare Impedit* are not needful to be answered to, and what may be traversed, and what Grants of the Crown shall be good notwithstanding some, and what Misrecitals.

These and many other Particulars, worthy of most Mens notice, are here debated; and it may reasonably be supposed, that none will be Enemies to the Design and Publication, but those who mislike the small Remainders, we have left us, of the Aristocratical part of our Government: the Gentlemen who do so, must be unacquainted with the Grecian and Roman Story, as well as with our own, or else have read it but superficially; for even the
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most perfect of the *Grecian* Common-wealths were somewhat Aristocratical. That which may be called such, is *Sparta*, which, tho' it had some Laws we cannot account for, yet during several Centuries it maintained its own Liberty, and assisted its Neighbours to preserve theirs.

And notwithstanding some Men may think the contrary, Democracy was not the only Favourite Model of the Ancient Legislators. The wise *Solon*, who founded that Popular Government of *Athens*, was not so fond of his own Frame, as to recommend it to other places, tho' he believed that it suited best with the Infirmities of the People: And even in *Rome*, before she acquired any great Reputation, there was a Senate, under Kings it had one, nor doth it appear that a Senate was adjudged useless, when it became and was called a Common-wealth. And as soon as the Senate lost its Authority, a Tyranny was set up: This may be called their Aristocratical Part; and whosoever reads the Lives of those *Roman* Worthies, *Cato Uticensis*, &c. that nobly attempted to defend the Liberties of their Country, will find, That it was for the upholding the Authority of the Senate, that they contested, fought, and died.

Machiavel indeed, in his Discourses upon the Decades of *Titus Livius*, has strained almost every thing in favour of Democracy, and with extream Art and Labour, hath illustrated

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lustrated a Popular State, and made *Rome* the Example of it ; and yet even in those Discourses, he sometimes shews the Necessity of an Aristocratical Mixture, to make a just and regular , and happy and lasting Government.

Nay, *Algernoon Sydney* himself, that famous Assertor of Liberty, doth almost every where prefer the Aristocracy; and he was confirmed in that Sentiment, by the Views he had taken of former and present Governments, and by the Knowledge he had of what formerly was our own Constitution, till *Henry* the Seventh's Reign: For that Prince (as the Lord *Bacon* rightly observes) was rather cunning in relation to his own Times, then a Person that had a full prospect of what would afterwards be the Consequence of his Measures, or that had a due regard to Posterity: No Man can wish, that the House of Lords should be made Cyphers ; if they could once again be made the Natural Balance between the King and People.

There drop , even from Mr. *Sidney's* Pen, Expressions enough to prove, that a just Composition of the Three Powers, Monarchical, Aristocratical, and Democratical, would have been reckoned even by him an equal Government.

Such a Mixture even our Government was ; and tho' some, perhaps out of meer Ignorance, have disputed the Democratical,
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and others the Monarchical part of our Constitution; yet no Body ever to this day could pretend, that our Barons, those *Majores Regni*, had not originally a Share both in the Legislature and Administration within this Kingdom: The Fact is not necessary to be proved, because 'tis not denied; and the reasonableness of it is apparent.

There's no occasion to Complement them for what their Ancestors did in procuring of *Magna Charta* (which the judicious and indefatigable Antiquary Sir *Henry Spelman*, saith, was only an Ascertainment or Recompilement of our Old Laws).

It would be of Publick Service, to have a just State of the true Powers of the House of Lords in their Judicial and Legislative Capacities, according to the true *English* Constitution; that we might be familiarized to the almost antiquated Notions of the Aristocratical part of our Government; and so may neither be overrun with the Schemes of Absolute Monarchy-Men, who would have all Judicial Power, even the Dernier Resort lodged in the Crown, or in Delegates appointed by it, and not in the Parliament, nor be crumbled into the Disorders which must follow the Notions of those who aim at a pure Democracy.

But to write an Exact Discourse upon this Head, would require more Lines than can become a Preface: The Reader therefore must not here expect an Account of the Growth

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Growth and Decays of their Power, and the true Reasons of Each ; and the Regulations or Restrictions that will be needful, if they ever happen in any degree to be restored to the Preheminence and Authorities , which they formerly enjoyed among us.

It is enough for the present to say, That all the Measures taken and used in the Exercise of their Judicature, are observed without Doors, especially by the Persons concerned , their Relations and Friends : That the Errors in such Exercise (if any) are only to be corrected by themselves, and no ways proper or fit to be suggested by any private Person, much less to be published in Print.

However, it may be hoped, that these Reports may probably convince the young Nobles of this Realm, and all who are employed in and about their Education, that some general Knowledge of the Laws of *England*, and some Acquaintance with History and other Learning, cannot be unworthy the Ambition of every Noble-man's Son , who has any hopes to sit as Judge in that August Assembly ; where the nicest of Questions, in Cases of the greatest Consequence , and between the greatest of Subjects, and many times between the King and his People, do frequently come under Consideration.

And these Papers may likewise remember them, what just Liberty of Arguing and Debating hath been allowed to Counsel, and
with

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with what Candour and Patience they have been heard, even in the most tender Points : As also shew them what Resolutions were taken upon those Debates and Arguments, that the Law may be consistent with it self, and remain (as it is) a certain Rule of doing Right.

As to the present Performance, the Reader is desired to pardon all Mistakes in Grammar, and in the Figures of Folio's and Pages, and other common Errata of the Press, which by reason of multiplicity of other Business, could not easily be attended to and observed.

-----*Omari Res ipsa negat*-----

THere will shortly be Printed, The Historical Library of Diodorus the Sicilian, the whole Fifteen Books, Translated from the Greek, with all the Fragments ; And will be Sold by Awnsham and John Churchill in Paternoster-row.

Dominus

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Dominus Rex,

&
Viscount Purbeck.

UPON a Petition, the Question was in the House of Lords, Whether the Dignity of a Viscount could be surrendered to the King by a Fine? And it was Argued at the Bar by three Counsel for the Petitioner, and by the Attorney General for the King. It was urged on behalf of the Petitioner, That a Dignity cannot be surrendered to the Crown; and that for these Reasons:

1. It is a Personal Dignity annexed to the Blood, and so inseparable and immoveable (See *Ratcliff's Case* 3 Rep. *Rutland's Case* 6 Rep. 53.) that it cannot be either transferred to any other Person, or surrendered to the Crown; it can neither move forward nor backward, but only downward to Posterity; and nothing but a Deficiency or a Corruption of the Blood can hinder the Descent, as if the Ancestor be Attainted of Treason or Felony, &c. For in that Case, the Heir conveying no Inheritable Blood, cannot make any Claim to that which is annexed to the Inheritable Blood; and besides, there is a tacite Condition of Possessure annexed to those Dignities, by the Breach of which Condition the Dignity is determined; but by the Act of the Party there can be no Determination of it, unless there be an Attainder which corrupts the Blood: And he took a difference between Ancient Honours and Dignities which were Feodary and Officiary (as Earl Marshal of England) which have a Relation to an Office or Land; for such are Transferrable over; and such Dignities as are only Personal, Inherent in the Blood, and only favour *quasi* of the Reality, of which no Fine can be levied, as 'tis of an Annuity to a Man and his Heirs, no Fine can be levied.

2. A Dignity was neither subject to a Condition at the Common Law, nor intailable by the Statute *de Donis, &c.* nor barrable by the Statute of Fines: Indeed, in *Nevil's Case*, something which favours of the contrary Opinion is said; but the Question there was, Whether 'twas forfeitable by Treason? And therefore the present Question is very forreign to the Matter there debated.

A Dignity differs from other Inheritances, being an Honour Personal affixed to the Blood, cannot be forfeited by a Non-performance of a Condition, except that Tacite Condition in Law, and consequently cannot be intailed; and tho' the Title of a Viscount be of a Place, yet it is only Titular, for it is often taken from the Surnames of Families.

3. The Title of Viscount, &c. is not so much a private Interest as a publick Right, for Peers are born Counsellors of State, and one part of a Senatory Body, and therefore cannot be renounced without the Consent of all those who have interest in it; they cannot, without the Consent of the whole Body, whereof they are so considerable Members, cut themselves off from the Body; and so the Objection of *quilibet potest Juri suo renunciare* is easily answered.

Tw'as further argued on the same side, That

1. An Honour goes not according to the Rules of the Common Law, nor is it governable by them, it is not therefore pertinent to argue from those Rules which hold in Cases of other Inheritances, for a Dignity descends to the Half-blood, there is no Coparciner'ship of it, but the Eldest takes the whole; a Fee-simple will go to a Noble-man without the word (*Heirs*) 1 *Inst.* 27. It differs from Estates in Land in the Intrinick Matter, as well as the Manner of the Limitation, because it is given for two Reasons, for Counsel and Defence; and it is a Civil Interest, appointed by the Civil Constitution of the Realm, which goes with the Blood, and is inherent in the Blood, inasmuch that it is agreed on all hands, that it can't be transferred to a Stranger; and till *Nevil's Case*, tw'as doubted whether forfeitable for Treason; if a Lord die, his Son shall be introduc'd without the Ceremony usual at the first Creation; a Peer's eldest Son, and all Minors, sit behind the Chair of State, to prepare them for the Sitting in the House as Members, and because they have some Title to the Honour they are called *Nobiles Nati*, for the first time they fetch breath they have Nobility in them: So that he that Surrenders by Fine, must not only extinguish his Estate in the Honour, but also the Nobility of his Blood.

2. Every Lord is not only a Lord for himself, but also hath a Right of Peerage, and is a Peer of the Realm, and therefore a Peer for every one of the House, and therefore hath the Privilege to demand his Writ *Ex debito Justitiæ*, and is to be tried by his Peers in Capital Crimes; and that appears farther from a Matter which happened in this House, 16 *Car.* 2. There was an Order mentioning the Bishops to be Lords of Parliament, not Peers; at which the Lords wondering, ordered a Committee to examine the reason of it; which proves that *Lord* is not so high nor inclusive as *Peers*: So that if the Fine have any Operation, it takes
away

away not only his Right, but also the Right of the House of Lords.

3. The trial of Baron or no Baron upon Issue in any Court of Judicature is by the Records of Parliament; but if a Fine may be levied in the *Common Pleas*, the Trial is drawn *ad aliud Examen*, and must then be by the Records of that Court. The Clerk of the Parliament always certifies if he be a Baron, because he hath the Record before him; but he cannot certify he is no Baron, because he hath not the Record thereof before him.

4. No Fine can be levied of a thing Personal, as an Annuity to a Man and his (Heirs), but a Dignity is a thing Personal; and so he took notice of the difference betwixt the Honours of Peerage, which are Personal, and the Honours that are Feodary and Officerly, which have reference to an Office or Land.

5. He did argue *ab inconvenienti* that this Opinion can be no Inconveniency to the Crown; but the contrary makes Nobility a meer Pageantry, by putting it into the Hands of a weak and angry Father, to dispossess an hopeful Son of that which is his Birth-right: The Titles of *Esquire* and *Gentleman* are drowned in the greater Dignity of that of a *Peer*, and when the greater are gone, the other must go with it: And then from being a *Nobleman* to day, he and the rest of his Family must be below all Nobility, and be called *Peomen* or *Goodman Villers* to morrow, which may bring great Confusion to a Noble Family and all its Relatives; and surely this House will not put such a publick Disrespect on such a Family, by agreeing to so unjust an act of one Man. And that which was most relied upon, was a Resolution of this House in *Stafford's Case*, Anno 1640. which no Man without Indecency can question; it passed not *sub silentio* or *obiter*, but upon debate; neither could it be any way invalid upon account of the Times, for it was in the Infancy of that Parliament, and that wherein a Peer's Case, who sits now in this House, was judicially before them; and therefore there is no reason to shake that Judgment more than any other Judgment of that time. My Lord Cooke in his 4 *Inst. Chapt. of Ireland*, is of Opinion that Honours cannot be extinguished but by Act of Parliament. Then as to the Precedents that have been urg'd on the other side, there are none directly to the Point; for as to *Nevil's Case*, there are very few Cases cited there aright, and are not to be look'd upon as Law. The Case of my Lord of *Northumberland* in 3 & 4 *Phil. & Mar.* was by way of Creation, and so was the Case of *Dudley*. And *Dugdale* in his *Baronage of England*, pag. 270. gives an account of it; and the rest of the Precedents are above Two hundred years old, which passed *sub silentio*, and are not to be vouched unless they were disputed. The first is *Bigod's*, who in the time of *Edw. 1.* surrendred the Honour of *Earl-Marshal* of *England* to the King, who granted it to him in Tail: This Honour is Officerly, and therefore nothing to the purpose; and the Surrender

was made thro' fear, *Walsingham* 95. The next is the Earl of Pembroke's Case, who in 8 *Edw.* 4. was made Earl in Tail, and by this he had the Grant of the Town of *Haverfordne*; the King afterwards inclining to dignifie his Son with that Title, procured him to Surrender by Deed, and bestowed on him another Title, and gave a greater Estate, and an ancients Honour. Here was an Estate Tail surrendered by Deed; it might work a kind of Discontinuance, but no legal effectual Surrender. And for the Case of *Ch. Brandon*, who in the time of *H.* 8. was created Viscount *Lisle*, afterwards he surrendered that, and got a Dukedom; now no Man ever questioned the efficacy of this Surrender, for he himself had no reason to question it, for 'twas to his advantage; and none other could question it, for he died without Issue, and his Honour with him: And so in the Case of my Lord *Stafford*, he surrendered, and got a new Honour. So that it appeared all these Cases were either Honours referring to Offices and Lands, or else such as were for the re-granting of greater Dignities, which they had no reason to question, and so they passed *sub silentio*: But here is not one Precedent that they did ever Surrender to the Prejudice of their Blood, or move themselves quite out of the House by Fine or Deed. And further, If Precedents be good for the Surrender of an Honour by Fine, why not also for Transferring of it to another? for of this we have some Precedents, *Daincourt's Case*, 4 *Inst.* 126. One Branch of the Family sat in the House by virtue of a Grant from the other Branch from the Reign of *Ed.* 2. to *Hen.* 6. and the Case of the Earldom of *Chester*, first granted 17 *H.* 3. n. 25. and transferred 39 *H.* 3. And there was an Attempt made in the Lord *Fitzwater's* Case, to make a Baron by transferring of the Dignity; but you will find all these Precedents disallowed: And 'twas said that no Man ever met with any Case where any Nobleman by Fine levied, or other Conveyance, became a Yeoman or Ignoble.

'Twas argued by another much to the same effect, That Baro- nage and Peerage is to be determined by the Records of the Lords House, and if any other way be given, as there must be, if a Fine be allow'd to barr, then the old true way is gone: This was not a Fine Conditional at the Common Law, and therefore not with- in the Statute *De donis Conditionalibus*, and an Honour being a Personal Dignity, is not to be barred (*Jones Rep.* 123.) by Fine, being inherent in the Blood, &c. The Duke of *Bedford* was by Authority of Parliament degraded, and that was for Poverty, and by Act of Parliament, and not by Surrender: Therefore Judgment was prayed for the Petitioner.

The Attorney General argued *pro Domino Rege* upon these Rea- sons:

1. There is but a defective Proof of the Creation of this Ho- nour, no Letters Patents, no Records of the Inrollment produ- ced, nor any Entry in any Office of such a Patent, as is usual; all that

that is pretended is, That he sat in some Parliaments afterwards as Viscount *Purbeck*; but that will not be accepted for proof; for no Man can be created Viscount but by Letters Patents: a Writ of Summons will be an Evidence of a Creation, but will not amount to a Creation; there is a Ceremony equal almost to that of an Earl, there must be a Coronet; all which must be performed, or he must have Letters Patents to dispense with it, which being Matter of Record, must be produced. 18 Hen. 6. *Beaumont* was the first created Viscount, but there was never any since, nor then without Letters Patents; for he is to take place of some, and therefore he must have something to show for his Precedency; but a Baron is the lowest Dignity, and therefore may be created by Writ: Neither can it be presumed that they were lost, for except it be produced it makes no Title; except they be produced, it shall not be intended there was any; neither can it be help'd by any concurrent Evidence, for if there were (*Page's Case* 5 Rep. 53.) a true Creation, there would be some Evidence in some of the Offices; but there is not in any of them the least vestigia of proof to ground a presumption.

2. Dignities, as well as other Inheritances, must be limited according to the Rules of Law; the Dukedom of Cornwall (in 8 Rep. the 1. the Prince's Case) was limited according to the strictest Rules of Law. And whereas it hath been said that Dignities differ from other Inheritances, that is where there is some particular reason for it, as in the case of Transmission or Alienation, which depends not upon the Manner of Creation, as shall be shewn afterwards: And for the Case of 1 Inst. 27. which was that an Inheritance of a Dignity may be created by other words than other Inheritances are, as an Estate Tail without the words *of this body*, there's not any such thing in the Book: 'Tis said indeed, that if the King for reward of Services done, do grant *Armories* to a Man and his Heirs Males, 'tis an entail of the Coat without saying *of his body*; but I think that will not be taken for the Case of a Dignity; the Statute *De donis Conditionalibus* extends to Honours; the word *terram* would be thought an improper word to comprehend all things tailable, yet said to extend to all, and to Honours too, 1 Inst. 20. and if an Honour can't be entailed, then no Remainder can be limited; and yet there be many Lords that sit in this House by Remainder by good Title. The Statute of 26 Hen. 8. 17. saith, That if a Man be Attainted of Treason, he shall forfeit his Lands, Tenements, and Hereditaments: Now 'tis adjudged that the word *Hereditaments* comprehends Honours; which show that they are subject to the same Rules of Law that govern other kind of Inheritances, and are comprehended with other Particulars without general words. This being premised, it's a known Maxim in all Laws, *Nihil rationi magis consentaneum quam rem eodem modo dissolvi quo constituitur*, which Rule is so general, that the highest Authority, i. e. the Parliament is not exempt from it; for 'tis not possible to establish any thing so firm by Statute, which cannot by another Statute be an-

annulled. Now in the Creation of a Peer there are three things; the Person that creates, the Person that is created, the Matter of Record whereby he is created. Now if the King, who is the Person that creates, and his Successors agree with the Person that is created Peer, and his Successors, the one to undo their parts, and the other to give away their parts, and there is a Matter of Record of as high a nature concurring to effect this Dissolution, &c. in some Cases 'tis in the power of an Ancestor, by his own act, to destroy a Patent; as if a *Scire Facias* in Chancery be brought against his Patent, and Matter is suggested whereby to avoid it, this shall (*Bro. tit. Patent. 37, 97.*) vacate whatsoever was created by the Patent, and yet 'tis there in the power of the Ancestor, by good Pleading, to have supported the Patent, and by bad pleading to destroy it; and therefore when the Foundation, which is the Patent, fails, the Honour, and whatever it be that is erected upon it, shall fail also: Every Estate by the consent of all Persons interested and concerned in the thing, may be taken away, for the Law is so set against Perpetuities, that a Clause intimating it is void, and tho' an Honour is not (*Jones Rep. 109, 123.*) assignable, yet it may be extinguished. It's true, if a Man hath but a part of an Estate, as only an Estate for Life, he can't alone pass away the whole Estate, but none who hath the Inheritance in Tail or in Fee, but he may destroy the whole, and tho' any one have but part, yet by the concurrence of all that are concerned, the whole may be destroyed: It is admitted if he commit Treason, and is attainted thereof, he loseth the Honour for himself and his Posterity; now 'twas in his power to do this act overt; and if by an act unlawful he hath power to defeat the descent of the Intail upon his Issue, there is the same reason that by a lawful act he should part with it; there are two Acts of Parliament in force which fortifie the Fine; it must be granted that those Honours are within the Statute *de Donis*, and then there can be no reason they should not be within the Statutes of Fines, 4 *Hen. 7. & 34 H. 8.* which say that Tenant in Tail may levie a Fine of all things that are intailable within the Statute *de Donis*, whatever therefore is within the one is within both: and it is not sufficient to alledge that it is inconvenient that it should be within the Statute of Fines; for there is an Act of Parliament, and without an Act of Parliament to exempt it, it can't be exempted: It may be proved by great variety of Precedents to have been the practise in former times, anciently nothing more frequent than to release Honours. See *Selden's Titles of Honours. 730.* it was as frequent as to grant them: In latter times (*Delaval's Case, 11 Rep. 1.*) it hath been the Judgment of the Lords that Honours may be extinguished, which in 1668. was certified by all the King's Counsel Learned in the Law to be good Authority. But to go a little higher, *Andrew Gifford Baron Pomfret* in Fee, 4 *Hen. 3. Rot. 100.* surrendered to the King: so 23 *Hen. 3. Simon Mountford Esq. Earl of Leicester*, having a Mind to take an Honour from his eldest Son, and confer it upon his younger, and so it was surrendered and regranted accord-

accordingly, *Selden* seems to construe this to be by way of Trans-
mission and not Surrender; yet others of later Authority (as
Cambden's Britan. Title *Earl of Leicester*) say expressly that he did
Surrender it; and *Selden* himself says it was by Concurrence of the
King: King *Hen. 3.* (*Rot. Cr. 24. men. E. 1.*) created one Earl of
Richmond, and he surrendered to the King (*Cambden's Brit.* Title
Earl of Richmond.) *Roger de Bigod* surrendered not only the Office
of Earl Marshal, but also the Earldom of *Norfolk*. *William Duke*
of *Juliers*, whose Father came in with *Edw. 3.* was created Earl of
Cambridge (40 *Edw. 3. m. 21.*) in Fee, his Son surrenders to the
King, which Record we have here: So *Edward* the Third made
his Son *John of Gaunt* (See *Cambden's ubi supra*) Earl of *Richmond*,
who surrendered it to the King. And lastly, in the Years 1639,
1679. *Roger Stafford*, whom the King intended to make a Viscount,
by the Advice of the Learned Men levied a Fine thereof, by which
'tis now enjoy'd. Lastly, he argued *ab inconvenienti*, for no Lord
in the House will be in safety if it should be other ways, there be-
ing many sitting in this House by virtue of Surrenders from other
Lords in former days, and perhaps some of their Heirs are alive; and
so if these Surrenders be adjudged invalid, it would shake your
Lordships own Possessions, and make it dubitable, whether For-
eigners and Persons unknown may not come and thrust them out;
but if not so, it may cause Confusion amongst themselves, their
former Honours having been surrendered to accept of others, and
perhaps some, not thinking their Titles secure, will stick to the
former, and so occasion Dispute and Confusion about Preceden-
cy; and lastly, it will put a great Disgrace upon your Ancestors
proceedings, who deemed this Course legal: and those must show
very good Precedents that it hath been disavowed, if they will en-
counter such constant Practises.

In the next place 'twas answered to their Arguments and Obje-
ctions: and as for that first Argument, That an Honour is inherent
in the Blood; he answered, That this Inherency in the Blood is not
essential to Honours, for an Honour may be created for Life, and
then none of the Posterity or Blood of the Peer is thereby enobled:
It may be limited to the Heirs Males of the Body, so that an Honour
may touch and enter far into the Blood, and yet not run with it; and
farther, it may be limited to the Heirs by such a Wife, there the Issue
by the second Venter shall never inherit the Dignity, and yet is as
near to the Father, as those that are by the first, so that 'tis no
true ground that they go upon, that Nobility is inherent in the
Blood; and for what was alledged as to the Inconveniency of
Surrendering Dignities, he answered, That there may be necessary
Reasons for the extinguishment of an Honour, and it may be for
the benefit and advantage of the Party and his Posterity; as if
it do happen that the Family do fall into Poverty, and be not a-
ble to support the Honour of Peerage with decency, and so this
Honour would perhaps be a Disgrace to the rest of the Lords;
and in a Child's Case, it may happen to a Noble Family to have
those Afflictions, that to continue the Honour would expose the
Family

Family to Infamy ; and therefore some times, to prevent the Son of Adultery from his succeeding to the Dignity, it may be convenient to surrender it ; and yet this cannot be without the concurrence of the Prince, who being the Source of Honour, can best judge of the Reasons for stopping the Stream ; and it cannot seem an harder Case to disinherit him of the Honour then of the Estate, which he may do ; and if he leave his Honour without his Estate, it will be a Burden on his Shoulders which he will be unable to bear ; and seeing it's necessary that there be a concurrence of the Prince, it is undecent to suppose so vile a thing of the Crown, as to comply with the Peevishness and Simplicity of the Parents, where there is no reason for it : And as for what hath been alledged for the Invalidity of those Precedents that they were in Cases of New Creations, and were in nature of Transmissions, he answered, That when an Honour is Surrendered, and a new Honour granted, the former is either extinguished, or not, before the other takes effect ; if not, then the Party hath both together against the will of the Donor ; and perhaps the new Honour may be of that Name and Place, and those Persons may be concerned in it, that will not permit it to be effected ; and if it be in the power of the Ancestor, for the advantage of his Posterity, by the Surrender of one Honour to take a greater, it may be also in his power to do it for his prejudice. As to the Objection, That by the same Reason an Honour may be extinguished it may also be Transferred ; he answered, That there was a great disparity betwixt them ; for as to Alienations of Honours, there's a great reason they should be disallowed, for they all flow from the Prince, and therefore 'tis not fit they should be conferred on any but by the Prince ; tho' the King's of *England* have granted power to a General to give the Honour of Knighthood, &c. in the Field, for the Reward and Incouragement of Valour ; yet this granting of Nobility is a Prerogative peculiar to the King's Person alone ; no Man else can ennoble another : Time was indeed, when the Earls of *Chester*, having Counties Palatine, by virtue of their *Jura Regalia* did create Barons, yet they never sat in Parliament as Peers, because Peerage being a thing of so high a nature, cannot be given by any but a Sovereign, and is given as a Trust and Obligation, so that common Reason saith they are not transferrable. It is said in our Law, that where Offices are granted to a Man in Fee (See *Jones* 122, 123.) he may grant it over ; yet in some Cases they are so near to the Crown, that they cannot be transferred, but must descend with the Blood, upon the same Reason no Man can ever transfer an Honour for the near Relation which it hath to the Crown ; but in case of Extinguishment that Relation and Trust ceaseth, and so they are different Cases. Then lastly, as to the great Objection of the Judgment of the House of Lords in *Roger Stafford's Case Anno 1640.* he answered, That notwithstanding that Case, their Lordships had given him leave to argue it, and therefore they intended not that should be any Impediment. 2. That is no Judgment ; for they being a Court of Judicature, do as other Judges,

Judges, judge of the Matter before them only. Then the Question was, Whether an Honour could descend to the half Blood? They referred it to the Judges, who were of Opinion that it should. Thereupon ariseth another Question, Whether a Man might Convey or Transfer his Honour to another? 'Twas resolved he might not. This drew another Question; whereupon they resolved that a Lord could not Surrender his Dignity; the Original Cause was about a Descent to the half Blood, the Resolution is he cannot Surrender; how then can they pretend that to be a Judgment, when the Question in point of Judgment was not before them. Suppose it had been resolved (and it's a wonder it had not all that time) that a Lord could not forfeit, and that had been a third step to have made it a perfect Business; for considering the times, it had been a most convenient Resolution: But besides all that, the King's Counsel were never heard in the point, and the rejecting the Opinions of Learned Men, shows it was no Resolution of the whole House, tho' entred upon the Journal, and therefore he prayed Judgment against the Petitioner.

The Earl of *Shaftsbury* spoke in the House for the Petitioner.

The stress of the Argument for the King in this Case is founded upon these two Assertions:

1. That Honours are taken to be within the Statute *de Donis, &c.* and the general Rules of that Statute;
2. And then secondly, That Honours are to be governed as other Inheritances, by the Rule of the Common Law.

As for the first, it hath not been proved; for the Resolution in *Nevil's Case* 2 Jac. was Extrajudicial, and no Judgment of any Cause before them; and in such Cases the Judges do not hold themselves to be upon Oath; and if there be two or more of another Opinion, they do not refuse to sign the Resolution of the major part, and so it goes under the denomination of all the Judges; but if it were a Judgment of them altogether, they could neither alter nor make new the Law, neither could they make that intended within the Statute *de Donis, &c.* which was not in being till many Ages after, *Beauchamp* in *Richard* the Second's time being the first Honour that was entailed by Patent.

2. The second Assertion is contrary to the Opinion of the most Learned Men, the Honour and Dignity of the House, the constant practise of *Westminster-hall*, and the direct Evidence of the thing it self. Justice *Berkley*, a very learned Judge, declared his Opinion Febr. 6. 1640. as appears by the Records of this House, That Honours descend from the first that was seized of them; contrary to the Rules of other Inheritances; and that Honours are not governed by the Rules of the Common Law. Justice *Dodderidge*, in *Jones* 207. is of opinion, That Honours are Personal Dignities which are affixed to the Blood; the Lords never yet suffered their Honours to be tried at any Court at Law, or any other where, save before themselves, tho' their other Inheritances are tried there

as well as other Mens: So *possessio fratris* holds of Lands, but not of a Dignity, which is not disposed of as other Inheritances, nor will it be guided by the strict Rules of Law. The Lord *Coke* is of Opinion in *Bedford's Case*, That an Honour could not be taken away but by Act of Parliament; therefore it will be allowed that the concurrence of all Parties concerned may extinguish this as well as other Inheritances, but the Concurrence of all can't be without Act of Parliament; for the whole Kingdom have an Interest in the Peerage of every Lord: It is a dangerous Doctrine to say our Judicature and Legislature is our own only. The House of Lords is the next thing to the Crown, tho' that be far above them; yet those that reach at that, must take them out of the way first; they were voted useless and dangerous before the Crown was laid aside; and as in Descent of the Crown the whole Kingdom hath such an Interest in it, as the King cannot Surrender or alien it, so in a proportionable degree, tho' far less, the King and Kingdom have an Interest in their Lordships, and Dignities, and Titles. It is true they may be forfeited, but it doth not follow that they may be extinguished by Surrender. There be two Reasons for the Forfeiture:

1. There is a Condition in Law that they shall be true and loyal to the Government.

2. Honours are inherent in the Blood, and when that is corrupted, that which is inherent is taken away; but in case of a Surrender these Reasons do not hold; there is no Breach of any Condition in Law, nor any Corruption of the Blood; for these Reasons Felony without Clergy forfeits Honours; whereas other Inheritances, tho' Fee-simple, are lost but for a year and a day, and so are Freeholds for Lives; which is another clear Instance that Honours are not governed by the Rules of Law. It is pressed as a known Law, that Honours are grantable for Lives; a Point of greater Consequence than the Thing in debate: It's not a fair way of arguing, nor to be allowed of. As for the Precedents that are *Selden* 730. is expressly against them; for it saith that the Honour of Baronages were in Abbots only in right of their Abbies, not inherent in them: So that 'tis plainly inferred that other Honours are Personal Dignities. The Lord *Delaware's Case* 11 *Rep.* makes nothing for them; for it doth not follow, that because he could not Surrender that which was not in him, therefore he might Surrender that which was in him. As to the other Precedents, he gave these three Reasons:

1. They were bare Surrenders, no Fines.

2. All those were made by Persons that had advantage by them, having greater Honours granted unto them; or such whose Interest was beyond the Seas, and therefore were willing to quit their Dependencies here upon good Considerations that pleased them: *Et volenti non fit Injuria.*

3. All these Surrenders passed *sub silentio*, and never admitted of any Dispute: But as for the sole melancholy Precedent of *Roger Stafford* 1638. which was condemned in Parliament 1640. 'tis to be observed

observed that Resolution can't be condemned because of the Times, for the Affront to the Lords, in taking such a Fine, was in 1638. and when could it be more properly remedied then in 1640. except it be expected there were a Prophetical Spirit of Judgment against a thing not in being; there were 94 Lords present; and the Vote was *Nemine Contradicente*, which gives it as great an Authority as any Resolution that ever was. The King's Counsel were not heard in the Case of Ship-money, nor Knighthood-money, where they had more right to claim to be heard than in this Case. To conclude, a Fine is a Judgment in the *Common Pleas*, and your Lordships Honours are not triable in that Court below in *Westminster-hall*; but if this Fine be allowable, they must be triable there as well as other Inheritances. And as to what has been said, That some of your Lordships sit here by Remainders, and they are in danger, if Honours be not allowed, to be intailed, it's denied; and if they be intailed, it's not of the same nature with other Inheritances; neither doth any Lord sit here by Title of a Remainder, but by Virtue of a new Grant in the same Patent.

'Twas afterwards declared, That the Lords Spiritual and Temporal in Parliament assembled, upon a very long Debate, and having heard his Majesty's Attorney General, are unanimously of Opinion, and do resolve and adjudge that no fine levied, or at any time hereafter to be levied to the King, can bar a Peer's Title of Honour, or the Right of any Person claiming such Title under him that levied, or shall levie such Fine.

Duvall versus Price.

WRit of Error on a Judgment in the Court of Exchequer affirmed on a Writ of Error before the Keeper of the Great Seal, &c. in an Action of the Case for Slander: The Writ was to this Effect, *Gullelmus & Maria, &c. Theſ. & Baronibus de Scaccario ſuo ſalutem, quia in recordo & proceſſu ac etiam in redditione judicij loquela quæ fuit in Cur' noſtra de Scaccar' coram Baronibus noſtris præd' de Scaccar' noſtro præd' per Billam inter Edward' Price Arm' debitor' noſtr' & Johan' Duvall Arm' de quadam transgreſſion' ſuper caſum eidem Edwardo per præſat' Johannem illat' ſuper quo judicium in Curia noſtra de Scaccar' reddit' fuit pro præſat' Edwardo verſus dict' Johann' qui quidem record' & proceſſ' cauſa Erroris intervenient' in Camera Conſilij juxta Scaccar' vocat' le Councel Chamber coram Domino Cuſtod' Magni Sigilli Angliæ & vobis præſat' Theſ. venire facimus & jud' inde verſus præſat' Johann' coram, &c. affirmatum eſt, & quia in affirmatione judicij præd' verſus præd' Johannem eoram, &c. Error' intervenit manifeſtus ad grave dampn' ipſius Johannis ſicut ex quærela ſua accepimus, quos Error' ſi quis fuerit modo debito Corrigi & eidem Johanni plenam & Celarem juſtitiam fieri volentes in hac parte, vobis Mandamus quod ſi judicium coram præſat' &c. affirmatum eſt, nullo record' & proceſſ' tam judicii quam affirmation' præd' cum omnibus ea tangentibus, quæ coram vobis jam reſident' ut dicitur nobis in Parliament' noſtro, viz. 17 die Septembris prox' futur' diſtincte & aperte mittatis & hoc Breve, ut inſpectis record' & proceſſu prædict' ulterius inde de aſſenſu Dominor' Spiritualium & Temporalium in eodem Parlamento Exiſtent' pro Error' illo Corrigend' fieri faciamus, quod de jure & ſecundum legem & conſuetudinem Regni noſtri Angliæ fuerit faciend' Teſte nobis ipſis apud Weſtm' 8 Maii Anno 6.*

Record' & Proceſſ' de quibus in Brevi de Error' huic Schedule annex' ſpecificat' ſit mentio, ſequitur in hac verba, Placita coram Baron' de Scaccar' &c. Midd' Memorand' quod alias ſcilicet, &c. And by the Bill, Price complains of Duvall, præſent' hic in Cur' eodem die de placito tranſfer' ſuper caſum pro eo, viz. quod cum he was a good Subject, and free from all Suſpicion of Treafon, and was a Juſtice of Peace in Radnor and Montgomery-ſhire, and well performed his Duty, and well-aſſected to the King and Queens Government, and ready to oppoſe all their Enemies, &c. the Defendant maliciously deſigning to prejudice the Plaintiff, and to bring him into the Diſpleaſure of his Prince, &c. did tali die & anno apud Weſtm' in Com' Midd' habens colloquium of the ſaid Plaintiff, ſay theſe Engliſh words of him, He (meaning the Plaintiff) is diſaffected to the Government, (the Government of the King and Queen meaning) and having other Diſcourſe of the Plaintiff, and of the Government of the King and Queen, did ſay of the ſaid Plaintiff theſe other words, viz. He (meaning the Plaintiff) is diſaffected to the Government, (the

(the said Government of the King and Queen meaning) By pretext of which said words, he was injured in his Credit, and fell into the Displeasure of their Majesties; and his Office aforesaid, by reason thereof, did totally lose, and remain'd hitherto daily in danger of a severe Prosecution as an Enemy to the King, &c. *ad damp' mill' librar', quo minus* He can satisfie the King and Queen the Debts he owes them: *Et inde producit scil' &c. pleg' &c.*

The Defendant pleads *Non cul*, Jury find *pro querent'*, and assess Damages 200 l. and Judgment accordingly; *posteaque scil. 6 Julij Anno 5. iidem Dominus Rex & Domina Regina Mand' hic Breve de Errore Corrigend' sub Magno Sigillo Anglie Thes. & Baron' de Scaccar' suo direct' in hac verba*, directed Thes. & Baronibus suis de Scaccar' suo, *quia in recordo & processu, &c. Error' intervenit manifestus ad grave damp' &c. sicut ex querela sua accepimus, ac cum in 31 Edw. 3. inter cetera concordat' & stabilit' fuit, quod in omnibus casibus Regem aut al' personas tangent' ubi quis queritur de Errore facto in Scaccario Cancellar' & Thes. Venire fac' coram eis in aliquam Cameram Consilij juxta Scaccar' record' & process' hujusmodi extra dict' Scacc' & assumptis sibi justic' & al' peritis tal' qual' sibi videbitur fore assumend' vocari fac' coram eis Barones de Scaccar' pred' ad audiend' Informationes suas & causas judicior' suor' & super hoc negotium hujusmodi debite facer' Examinari, Et si quis Error' invent' fuer' illum corrigend' & rotulos Emendari, ac postea eos in dictum Scaccar' ad Execution' inde faciend' remitti fac' sicut pertinet, prout in eodem Statuto plen' Continent' Nos igitur volentes errorem si quis fuit juxta formam Statuti pred' corrigi & partibus pred' plenam, &c. Vobis mandamus quod si judicium inde reddit' sit, hinc record' & process' pred' cum omnibus ea tangentibus coram Domino Custod' Magni Sigilli Anglia & vobis prefat' Thes. in Camera Consilij juxta Scaccar' pred' vocat' le Councel Chamber die Martis, viz. 31 Octobris, prox' futur' Venire fac' ut idem Dominus Custos Magni Sigilli Angliae, & vos prefat' Thesaur' Visi & Examinatis, &c. ulterius in hac parte de Concilio Justiciar' & al' peritor' hujusmodi Fieri fac' quod de jure & secund' formam Statut' pred' fuit faciend' Test' nobis ipsis apud W. &c.*

Ad quem diem Martis, viz. 31 die Octobris coram Johanne Sommers Mil' Domino Custode Magni Sigilli Angliae (nullo Thesaur' adtunc Existente) hic scil' in Camera Consilij apud Westm' pred' venit pred' Johannes Duvall per S. A. Attorn' suum. Et pred' Thesaur' & Barones record' & process' pred' cum omnibus ea tangentibus tunc hic Venire faciunt, Et super hoc the said J. Duvall assigns the General Error, and the said Price pleads In nullo est Erratum; and after several Curia advisare's, and days given, super hoc visis & intellectis omnibus & singulis premissis per prefat' Dominum Custodem Magni Sigilli pred' (nullo Thesaur' adtunc Existente) maturaque deliberatione inde habita assumptis sibi J. Holt Mil' Capital' Justiciar' &c. & G. Treby Mil' &c. Vocatisque coram eo Baronibus de Scaccar' pred' auditisque rationibus Baronum pred' Visum est prefat' Custodi Magni Sigilli pred' (nullo Thesaur' adtunc Existente) de Concilio Justiciar' pred' quod in record' aut processu pred' vel redditione jud' pred' in nullo est Erratum Ideo consideratum est per pred' Custodem Magni Sigilli

Sigilli Anglie (nullo Thesaur' adtunc Existente) quod judicium præd' in omnibus affirmatur, &c.

Upon the General Error assigned here in the Judgment, and Affirmance aforesaid, the single Query was, If these words, *He is disaffected to the Government*, be actionable? And it was argued by the Counsel for the Plaintiff in the Writ of Error, that they were not, because they are general and uncertain, do not import any particular Crime which exposes to any particular Penalty, and they carry no Reference to his Office; and tho' he be alledged to be a Justice of the Peace, yet there's no *Colloquium* laid concerning his Office. To make words actionable, they must either tend to the Scandal and Discredit of the Party, or such, if true, as must bring Damage to the Party, of whom they are spoken: or otherwise, without special Damage laid and proved, there's no reason for the Jury to give Damages, because he suffers none. In ancient time these Actions were rare; the *Year-Books* are little acquainted with them; and tho' latter Ages have countenanced them, yet it hath been under certain Rules and Limitations, as that they ought to be particular and clear; for if they are so general as to be ambiguous, no Action is warrantable upon them; and therefore they must be of a single and known Sense, and such against which no other Intendment can reasonably be admitted; Slander raised by Argument, or Implication, or Inference only, is not enough to maintain an Action: And tho' the *Causa dicendi* be not inquirable now, after a Jury hath found them spoken as laid, *viz.* maliciously, yet if the words themselves do not imply Malice and Damage, the use of those Adverbs which are commonly mention'd in such Declarations, will not alter the Case; for Men are to be answerable only for their own words, and not for words expounded or described in another manner than the Speaker intended: Here the word *disaffected* is none of the plainest; nor is the word *Government* much plainer; the first is only a Negative, and to say *He is not affected to the Government*, goes only to a want of Zeal, or an indifference of Temper, and doth not carry in it any treasonable Intent or Purpose, much less any Act done.

And as to the pretended Special Damage, in the loss of his Prince's Favour, or incurring his Displeasure, that is such an Allegation as should not have been made, 'tis neither mannerly nor justifiable in the Plaintiff to affirm such a thing upon Record. And as to the loss of his Office, that can be no Damage, the same being no Place of Profit, but meerly of burden and trouble. 'Twas further urged, That if these words were allowed to be actionable, *Tory, Whig, or Jacobite*, or any other common, rude, uncertain Terms in Discourse might pretend to it, according to the respective Turn of Times, and consequently no Body would know what Discourse is allowable: As ill Tongues were to be corrected, so care is to be had of Liberty of Speech, not to make every thing a Cause of Action; and to justify this, on the same side were quoted multitude of Cases, too many to deserve a remembrance.

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It was argued on the other side, That these words toucht the Person in the most tender point, *viz.* his Loyalty; That it carried Scandal in it self, not to be zealously affected to the Government, which protects the whole; that it was equivalent in Common Understanding, to the calling him *Traytor* or *Rebel*: That this was much more, than affirming one not to be a *good Man*; that *disaffected* implied somewhat positive; it's meaning was, that the Party hath an aversion, a fixed, settled Enmity to the Government; that this was spoken of an Officer of great Trust; that 'twas a Reflection upon him with regard to his Office, for Loyalty is as necessary as Justice in such a Post; that to slander him in the one, ought to be as actionable as to slander him in the other; which is allowed it will, because of the Reference to the Office in the nature of the words, without any Special Damage: that to deny these words to be actionable, would tend to encourage Breaches of the Peace, by provoking Challenges, &c. for that, if Men cannot relieve themselves by Law, they will be tempted to do it of themselves in other methods; and that these words were a Reflection on the Government, which employed Men thus disaffected; and abundance of the Common Cases upon this Subject were quoted, to shew what words would bear an Action in respect of Officers and Allegiance: And then 'twas argued strenuously, that this was a Special Damage, *viz.* to lose the Prince's Favour, which every Man ought to covet, and to lose a Place of Honour and Command, both which the Jury have Found.

It was replied on the behalf of the Plaintiff in the Writ of Error, That as to the Reflection on the Government, it might perhaps warrant an Information or Indictment, but not an Action: That as to Challenges, there were vast variety of words which are reckoned provocative in the highest degree, As the giving the *Lie*, calling a Man a *Coward*, and the like, and yet will bear no Action: And at last, upon Debate, the Judgment was Reversed.

John Duvall and Elizabeth his Wife, Appellants,

Versus

William Terrey of London Merchant, Respondent.

THE Appeal was to be relieved against a Decree in *Chancery*: The Case was, That the Appellant *Elizabeth* had entered into a Bond of 140 *l.* Penalty, conditioned for the payment of 72 *l.* on the Twentieth of *April* 1676. and by reason of several Promises and Delays of Payment, and insisting upon Privilege, and other like Occasions, it was not put in Suit till lately, and then the Respondents were Arrested: And upon a Declaration, the Appellants pleaded Payment at the Day. And after
Issue

Issue joyned, and notice of Trial, upon some discovery of a Defect in the Evidence to prove the Bond, Motion was made in the *King's Bench* to alter the Plea; which denied, a Bill was preferred in *Chancery*, on suggestion that *Elizabeth* had never Executed it, or that 'twas obtained by Fraud, and that there was no Consideration for the same; and the Respondent preferred a Bill, praying a Discovery if such Bond, &c. Upon Examination of Witnesses, and after publication passed, the Cause was heard; and upon the hearing, 'twas ordered, That the Appellants should not be relieved, save against the Penalty of the Bond; and that it be referred to one of the Masters to compute the Principal-money and Interest due thereon, and to tax for the Respondent, his Costs, both at Law and in that Court; and that what should be found due for the Principal, Interest, and Costs, be paid by the Appellants at such Time and Place as the Master should appoint, who computed the Principal and Interest at 154 *l.* and the Costs at 67 *l.* and to be paid the Twentieth of *October* following.

Upon the hearing of this Appeal, there were two Queries made, 1. Whether, there being some difference in and about the proof of the Bond, the Court ought to have made a Decree without directing a Trial at Law upon the validity of the Bond: But 'twas held, That the Bond not being denied in pleading upon the Issue at Law, the *Chancery* had done right, and could not well have directed any other Issue than what the Parties themselves had joyned in at Law; and tho' 'twas pretended that the Attorney had pleaded thus without direction, the Court did not much regard that pretence, because of the proper Remedy which the Law gives against such an Attorney, if the pretence were true, and therefore they did not much consider that.

Another Query was, Whether the Court of Equity could justly award more than the Penalty? and objected, that the Order being to save against the Penalty, no more ought to have been decreed. But 'twas said, That notwithstanding that, when the same was referred to a Master to tax Principal and Interest, the Order bound the Party to pay both, tho' it amounted to more than the Penalty; and the meaning of the first part was only to relieve against the Penalty, in case the Principal and Interest came to less than the Penal Sum; especially the same coming to be heard upon cross Bills, and as this Case was circumstanced, after such delay and such pleading in the Court of *King's Bench*: And as to Costs, held no cause for an Appeal in this Case; nor in truth was it ever known to be a Cause, if the Merits were against the party Appellant. And so the Decree was affirmed in the whole.

William Dolphin and Katharine his Wife, Appellants,

Versus

Francis Haynes Respondent.

Appeal to be relieved against a Decree in *Chancery* made by the Master of the Rolls, Nov. 10. 1696. The Case was thus, That one *Paris Slaughter* of *London*, being Guardian to *Katharine* the Appellant during her Infancy, he placed her with his Kinsman *Chambers Slaughter* near *Worcester*, and sometimes boarded her in that place for her Education; and the Respondent and the said P. S. being Correspondents, *Paris Slaughter* ordered the Respondent to pay the said *Chambers* what Sums should be called for upon the account of *Katharine*: In pursuance whereof several Sums were paid upon her account, and the same were allowed again to the Respondent by P. S. The Appellant *Katharine* having just attained her Age, she came to the Respondent, and desired more Money, as by the Order of P. S. and accordingly two several Sums were paid her, and Receipts taken from her, as by the Order of P. S. The Appellant *Katharine* did afterwards come to an account with P. S. which was fairly stated in Writing, and they executed General Releases each to the other: But the said two Sums, not being entered in the Books of P. S. were not accounted for by the Appellant *Katharine*; and the Respondent not having received any Allowance from P. S. in his Life time, nor having, as he thought, any sufficient Orders to charge the Executor of P. S. with, he prefers his Bill against the Appellants, and by her Answer she own'd the Receipt of the two Sums, but by order of P. S. and afterwards, upon hearing of the Cause, the Court declared that there appearing no positive orders from P. S. for these two Sums, the Appellants ought to pay the Principal, Interest, and Costs: And a Decree was made accordingly.

And now it was argued on the behalf of the Appellants, That this was not just, because the Respondent never paid any Money to any Body while *Katharine* boarded with him, or afterwards, but by the Order and upon the Credit of P. S. and charged it to his Account; and the Respondent did not pretend but that all was repaid him, excepting these two Sums; that the Respondent and *Katharine* had never any Account or Dealings together upon her Credit; and 'tis to be presumed that the Respondent hath charged these Sums upon the Account of P. S. and not to her Account, because the Receipts are so worded, and that *Katharine* had released P. S. on their accounting together, and therefore she could not charge the Executor of P. S.

On the other side, it was argued, That there was a Badge of Fraud in the Appellant *K*, that upon her Account with P. S. no mention was had of these Sums; that the Debt was originally hers; that she was obliged to pay it, either to *Slaughter* or to

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Haynes;

Haynes ; that not having paid the same to *Slaughter*, and *Slaughter* having released to her, she was discharged from all Demands on that side, and therefore 'twas the more reasonable it should be answered by her to the Respondent ; that tho' the Credit might be at first given to *Slaughter*, yet the Money being paid to her, and not by her paid to *Slaughter*, *Haynes* had a fair Claim against her, even to avoid circuity of Suits ; for if this were otherwise, 'twould only turn *Haynes* upon the Executor of *Slaughter*, and that Executor upon *Katharine* the Appellant again in Equity to set aside the Release, and to have an allowance of these Sums ; and that in Justice and Equity the Charge was placed upon the proper Party, who at first was the Debtor for what she thus received : And accordingly the Decree was affirmed.

Dormer Sheppard & al'

versus

Joseph Wright & al'.

Appeal from a Decree of Dismission of a Bill preferred in the Court of Chancery : The Case was thus, The Appellants did in the Year 1693. load on Board the Ship *Union* at Gallipoly 210 Tuns of Oyls, of which Ship the Appellants were Owners ; and the Respondents loaded on Board her at *Messina* 85 Bales of Silk, upon Freight by Contract both to be delivered at *London*. The Ship homeward bound was chased into *Malaga* Mould by one of the *Thoulon* Fleet, who were three or four days in sight, then stood in for that Port, as if designed to attack the Fort ; and thereupon the Master discoursed the Owner's Factor, who sent him off a Lighter to save what they could of the Ships Cargo ; and because the Silk was of the greatest value, the Silk was put on board the Lighter, and carried ashore ; and to come at the Silk, (for it lay beyond the Oyls) they were forced to rummage the Ship : In saving of which, and some small part of the Oyls, many hours were spent, and by the Seamen only, and at Night the *French* left the Port, whereupon no more was landed. But about six days afterwards the *French* Fleet appeared again before *Malaga*, and then all Endeavours were used to save the Oyls, but were prevented by the Boats which the *French* Men of War sent into the Harbour, and the Enemy forced them to their Guns, and when they could defend the Ship no longer, they bored holes to sink her, but the Oyls kept her from sinking, and the *French* took her, and carried her away. The Bales of Silk were afterwards put on board another Ship, and delivered to the Respondents at *London*, for which they paid the Freight, &c.

The

The Appellants pretending that they ought to have a share of the Silk which was saved, in proportion to the value of the Ship and Oyls which were lost, they exhibited their Bill in Chancery, to enforce the Respondents to come to an Average with the Appellants for the loss of their Ship and Oyls. And after Examination of Witnesses, on the hearing of the Cause, the Bill was dismissed.

And it was argued on the behalf of the Appellants, That this Dismissal was not justifiable by the Rules of Equity; for that it must be agreed, If Goods are thrown overboard in stress of Weather, or in danger or just fear of Enemy, in order to save the Ship and rest of the Cargo, that which is saved shall contribute to a Reparation of that which is lost, and the Owners shall be Contributors in proportion; and that there was the same Reason here; that by preferring the salvage of the Silk (being the best of the Cargo) before the Oyls, the Owners were deprived of the same opportunity for the salvage of the Oyls; that as the Sea-law in Extremity directs the Master to preserve the best of his Cargo, and the Goods saved ought to contribute to the loss of the Goods Ejected; so where one is preferred before the other in case of Extremity, there being not time to land the whole, average is just and reasonable. And as to the six days time, there was then no apprehension of danger, and consequently the Master could not justify the landing of any thing after the reason of their Fears were removed.

That the prudence of their Master in saving the Silk before the Oyls, ought not to be to the prejudice of the Owners interest, the Oyls lying next to be preserved; that the pretended neglect of the Master, in not landing them during the absence of the Enemy, is no Excuse, because then there was no danger; that the saying that the loss of the Ship and Oyls did not contribute to the salvage of the Silks, is no reason, seeing the salvage of the Silk (which had otherwise been lost) deprived the Owners of the same opportunity for the salvage of the other Goods; that in such Adventures, as the danger is common, so ought the loss or damage to be common and equal; that the Master is equally intrusted by and for all; and were it otherwise, it had been the Duty, and will be the Interest of all Owners of Ships to order their Servants in Extremity to preserve their own Goods; that the Silk, being of the greatest value, it was a National Service, to preserve that before the Oyls, and therefore equitable that all who embark in the same Bottom, should share alike in the Service done for Salvage, &c. And further, that if in Extremity, the safety of the best of the Ships Cargo is not preferable before that of the meaner value, it will be of ill consequence; and therefore the Sea-law provides first for the Safety of the best of the Cargo, and the Master acted accordingly and that 'tis the Opinion of those who are learned in the Maritime Laws, That where Freighters Goods are equally in danger, and a like opportunity for the salvage thereof, if the safety of the one be preferred, and the other comes to be

lost, such preference obliges the Goods preserved to contribute to those which are lost; it being a General Rule in Causes Maritime, That one Man's Interest ought not to suffer for the Safety of another.

On the other side, it was argued with the Decree, That this Pretence was new; that 'twas a Notion unprecedented; that the Rule of Averidge went only to the cases, where the loss of one Man's Goods contributed to the safety of another, as by Lighting the Vessel, &c. and not to this Case; that here each Man was to undergo the Peril of his own Goods; that in case of Damage to Goods within the Vessel, other Goods were not contributory, but the Owner must endure his own loss, and had only his Remedy against the Master, if it were occasioned by his Defect or Miscarriage: that the reason of Averidge was a meritorious Consideration in the common Case, because there the loss of one did actually save the other; but here was no such thing: The loss of these Oyls did not save the Silk, nor did the saving of the Silk lose the Oyls; for if the Silk had not been saved, the Oyls had been lost, for they were so bulky that they could not easily be removed without further time; and if part only be saved, 'tis to the advantage of the Owner; and where all cannot be saved at a time, the Benefit is accidental to him, whose Goods the Master's discretion directs to be saved: And in this case here was no such Commodity, as could contribute to the loss of a Ship, if it had been kept on Board; for the Silk, if on Board, had not assisted to her sinking. But besides, here were six or eight days between the landing of the Silk and the seizing of the Ship by the *French*, in which time all the Oyls might have been landed, and thereby both them and the Ship saved; and the apprehension of the Danger could not so soon be removed by losing sight of the Enemy in the Morning, and therefore there was no reason for the Master immediately to forbear landing his Oyls. Therefore 'twas prayed that the Appeal might be dismissed, and the same was accordingly done, and the Decree of Dismissal below affirmed.

Whitfield & Ux' & al' Appellants,

versus

Paylor & Ux' & al' Respondents.

A Ppeal from a Decree in *Chancery*: The Case was thus, Sir *Lawrence Stoughton*, a young Baronet in *Surrey*, having an Estate of near 1000 *l. per Annum*, was a Servant to the Respondent *Mary*, the Daughter of one *Burnaby* a Brewer, reputed to be very rich. Upon the first Propofal of Marriage, *Burnaby* did agree to give 5000 *l.* certain, and insisted to have a Jointure of 500 *l. per An.* settled

settled, and that she should have the Inheritance of the Jointure, if he died without Issue. Sir *Lawrence* did refuse to agree to this; but afterwards he renewed the Treaty himself, and accepted of Articles for payment of 5000 *l.* Portion, and made a Settlement of a Jointure of Lands worth 500 *l. per Annum*; and likewise made another Deed in the nature of a Mortgage of all his Estate, as well the Reversion of her Jointure as the rest, for securing the payment of 5000 *l.* to her in case Sir *Lawrence* died without Issue; and died within a Fortnight after Marriage, without Issue. The Lady *Stoughton* prefers her Bill, and prays the Appellants might be fore-closed of the Equity of Redemption on Failure of Payment. The Appellants exhibit their Bill to be relieved against this as a Fraud; and upon hearing of these Causes before the Master of the Rolls, the Appellants were decreed to pay the 5000 *l.* by the first Day of *Hilary* Term, 1695. without Interest, but with Costs: And in default, the estate to be sold to raise it with Interest from that Day: And upon a re-hearing before the Lord Keeper, his Lordship confirmed the Decrees, and gave a Twelve-months further time for payment.

And now it was argued for the Appellant, That it was proved in the Cause, that Sir *Lawrence* was a sickly weak Man; that on his Death-bed he declared he had made no such Agreement; but that the 5000 *l.* was to pay his Debts, and no part of it was to return to his Wife, and his Wife present, and not contradicting it; that it did not appear, that he had any Counterpart of this Deed, or that he ever advised or acquainted any of his own Relations with it; and the Draught of the Deed was confessed to be burnt. And further, that the Agreement in its own nature was unreasonable; that she should have both Portion and Jointure; and that one was a merit for the other; but that both should be vested in the same Person, the Portion returned, and the Jointure enjoyed, was very hard, and therefore to be set aside: That Equity was to relieve against such pretended Agreements, as things done without any Consideration inducing them, and therefore void.

On the other side, 'twas insisted on for the Decree, That the Man was of Age; that there were two Treaties of Marriage, which shews a deliberation; that here was no mis-representation or imposition; the Bargain in it self might be upon good reason; the Gentleman being sickly; and the Money was to be returned only upon a Contingency of his dying without Issue; that in case of his having Issue, the Agreement was common; that perhaps she had the worst on't under all Circumstances; that all Bargains are not to be set aside, because not such as the wisest People would make; but there must be Fraud to make void their Acts; and his forgetting that he had done such an Act, when on his Death-bed, is no reason for to annul it; and the Marriage had been a good Consideration for a Jointure of it self: And reasonable or unreasonable is not always the question in Equity, if each Party was acquainted with the whole, and meant what they did; much less is it sufficient to say that 'twas unreasonable as it hapned in event; for if at the time 'twas

'twas a tolerable Bargain; nay, if at the time this Bargain was the meaning of the Parties, and each knew what was done, and neither was deceived, the same must stand: And accordingly the Decree was affirmed.

Thomas Arnold Appellant.

Versus

Mr. Attorney General,

Matthew Johnson Esq.

Thomas Bedford Gent.

} Respondents.

Appeal from a Decree in Chancery: The Case was thus, One Edmund Arnold Proctor, being seized in Fee of the Mannor of Furthoe to the yearly value of 240 l. per Annum, and also of some Personal Estate; but having no Child or Brother living, made his Will in writing, and thereby, amongst other Legacies, to many other Persons, he gave to the Appellant, by the Name of his Kinsman Thomas Arnold, the Sum of 40 s. all to be paid out of his Personal Estate; and then proceeds in these words, *Being determined to settle for the future, after the death of me and my Wife, the Mannor of Furthoe, with all the Lands, Woods, and Appurtenances to charitable Uses. I devise my Mannor of Furthoe, with the Appurtenances, unto Sir Lionel Jenkins Kt. William Dyer, Matthew Johnson, and Thomas Bedford, and to their Heirs and Assigns for ever, upon trust, that they or their Assigns, after the death of him and his Wife should pay and deliver yearly for ever, several particular Sums to Charitable Uses therein mentioned: All the Particulars amounting in the whole to 120 l. per Annum, and charged nothing further on the said Mannor, but the Expences of the Trustees in the Execution of the said Trust. The said Arnold soon after died; the Wife is also since dead. Sir Lionel Jenkins and William Dyer also dead.*

In Trinity 1692. the Attorney General prefers a Bill against the Appellant as Heir at Law to settle and establish the said Charities, and to enforce the Trustees to act or to transfer their trust Estate. To which they answer, and the Heir by his Answer claimed as Heir at Law, the Surplus of the Charity Estate over and above what would satisfy the yearly Payments expressed in the Will, and the Charges of executing the said Trust; upon a Reference to a Master, to ascertain the Court of the yearly value of the Mannor; he reports it worth 240 l. per Annum, and worth the same at the time of making the Will. And on hearing the Cause, the Court declared, That all the Profits of the Premises, ought by the purport and intention of the Will, to be applied to the Charities therein mentioned; and that the Appellant Arnold the Heir at Law is totally excluded from the Surplus, with direction how the

the Surplus should go in augmentation of some of the Charities; nevertheless, in case the Appellant should Seal and Execute to the Trustees a Release and Conveyance of the Premises, according to the Decree, then he to have his Costs out of the Sale of Timber, and that the Trustees be indemnified.

And it was argued on behalf of the Appellant, That this Decree was not equitable. Some Questions were made about the distribution of the Surplus amongst only some of the Charities, and about the value; but a Surplus was agreed to be in the Case; and 'twas chiefly insisted upon, that the Surplus ought to go and be to and for the use of the Heir at Law; for that the Estate is not increased by any subsequent or accidental Improvement, and so not like the Case of *Thetford School*; but here at the time of making the said Will, was, and now is, of a good value beyond the Sums given, and was so known to be by the Testator; and the particular Charities given by the Testator are particularly and expressly named and limited, and do amount only to so much, as is less than the value of the Land; and this surplus is not disposed of, and consequently ought to be the Heirs. For as at the Common Law in a Will, what is not given away must descend, whether you speak of Land, or the interest in it; so in Equity, whatsoever Trust, or part of a Trust, is not declared and expressed, the same shall be for the benefit of the Representative of the Testator, either Heir or Executor, as the Case may happen: Then these Bequests or Devises being particular and express, they do and will controul and expound, may restrain and qualify the meaning of general precedent words: That Expression of his being determined to settle his Mannor to charitable Uses, will be qualified by the Particulars afterwards, as is *Nokes's Case* in 4 *Rep.* and many others in the Books. Besides, 'tis not accompanied with any term of Universality, that excludes the Construction contended for; and if it had been so largely expressed, those general words of his designing to settle the whole, may be intended only as a Security, that the particular Charities may be certainly answered: And by such Construction all the words of the Will may be satisfied; and then the Trustees may convey the Premises to the Heir at Law, and take Security for the same, saving and reserving all the said Charities devised, with all reasonable Charges and Deductions, without prejudice to the Will of the Testator, or to the said Estate, which must nevertheless be liable to answer and make good the same; so that there can be no Damage done to any of the Parties or Interests concerned, by this Construction; nay, it is the adding a further Security for their payment. Now it is plain, he designed the Sums given to the particular Uses, and no more, for that they are all so particular and express; and it is pursuant to the Rules of Law and Equity, in all doubtful Cases, to adjudge in favour of the Heir at Law, and not to extend the general words of a Will, to enlarge a Charity beyond the intent expressed, especially against a near Relation and Heir, as this is, viz. his Brother's Son.

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Besides, the Testator was bred a Civilian, and as such, knew how fully to express himself; if he had intended the Overplus to go in increase of the Charity: Or if he had intended them more then is mentioned, he would have declared himself in such manner as should exclude all doubt.

On the other side, it was argued, That the Testator's intent plainly appeared by his Will to dispose all his Estate wholly to charitable Uses; and that the words of the Will were sufficient to carry the whole Estate to that purpose; and that it did not appear by his Will, that 'twas his intent to give his Heir at Law any thing out of his Real Estate; that his determination to settle his Mannor, with the Appurtenances, was to settle the whole; that what is not disposed of in Particulars, is to be directed by the Court of Chancery; that that Court hath done right in directing it in augmentation of the Charities mentioned, because the Testator's intent was most in favour of those which are so mentioned: That if the Query were askt, What shall be done with the Surplus, if any? The Answer is natural, viz. I am determined to settle the Mannor, that is the whole, on Charitable Uses: That the Testator by his Will expressed some Care for his Sister, and for John Boncher his Nephew, and other his near Relations; but neither by any Expression or Implication, pointeth at any provision designed for his Heir at Law; but for the Excluding him of all Pretences, hath bequeathed him 40*l*. and no more: that the other is to contradict his plain Intent; 'tis to make a new Will for him, contrary to the determination which he saith he had made: And accordingly the Decree was affirmed.

Sir Richard Dutton Plaintiff,

Versus

Richard Howell, Richard Grey, and Robert Chaplain,
Executors of Sir John Witham deceased.

WRIT of Error on a Judgment given in B. R. for Sir John Witham and Sir Richard Dutton, and the Award of Execution thereof upon Scire Fac brought by the Defendants, as Executors of Sir John Witham; and affirmed in the Exchequer Chamber in Trespass and False Imprisonment. The Case on the Record was thus; The Plaintiff Witham did declare versus Dutton, for that he with Sir Robert Drex Baronet, Sir Timothy Thornhill, Henry Wilford, Thomas Wilford, and Samuel Bayner, did 14 Octob. 16 Car. 2. at Lynn Parishes Ward &c. assault, beat, and wound the Plaintiff, and imprisoned him, and his Goods then found did take and seize, and the Plaintiff in Prison, and the Goods and

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Chattels from the Plaintiff did detain and keep for three Months next following, by which the Plaintiff lost the Profit he might have made of his Goods, and was put to Charges, &c. *Contra pac' & ad damp'* 13000 l.

The Defendant pleads Not Guilty as to the *Ventr' vi & armis*, and all the Assault, Imprisonment, and Deteiner in Prison before the Sixth of November, and after the Twentieth of December in the same Year; and as to the beating, and wounding, and taking, seizing and detaining his Goods, and thereupon Issue is joyned; and as to the assault, taking and imprisoning the Plaintiff the Sixth of November, and detaining him from thence until in and upon the Twentieth of December. The Defendant doth justify, for that long before, viz. the 28th of Octob. 32 Car. 2. by his Letters Patents shewn to the Court, did constitute and appoint the Defendant his Captain General and Chief Governour in and upon the Islands of *Barbadoes*, and &c. and the rest of the Islands lying, &c. and thereby commanded him to do and execute all things that belonged to that Government, and the Trust in him reposed, according to the several powers and directions granted to the Defendant by the Letters Patents, and Instructions with them given; or by such other powers or instructions as at any time should be granted or appointed the Defendant under the King's Sign Manual, and according to the reasonable Laws, as then were, or after should be made by the Defendant, with advice and consent of the Council and Assembly of the respective Islands: appoints twelve Men by name, viz. Sir P. L. H. D. H. W. S. N. T. W. J. Witham the Plaintiff, J. P. J. S. R. H. E. S. T. W. and H. B. to be of the King's Counsel of the Island, during the pleasure of the King, to be assistant to the Defendant with their Counsel in the management of the Things and Concerns of the Government of the said Island, in relation to the King's Service and good of his Subjects there, and gives power to the Defendant, after he himself had taken the Oath of Office, to administer to every Member of the Council and Deputy Governour the Oaths of Allegiance and Supremacy, and the Oath of Office: with further power to the Governour, by advice and consent of Counsel, to summon and hold a General Assembly of the Freeholders and Planters there, and to make Laws, Statutes, and Ordinances for the good Government of the Island, and to be as near and consonant, as conveniently may, to the Laws and Statutes of *England*, which Laws were to be transmitted, to be allowed by the King here; with power also, by advice and consent of Counsel, to erect and establish such and so many Courts of Judicature, as he shall think fit for hearing and determining all Causes, as well Criminal as Civil, according to Law and Equity, and to appoint Judges, Justices of Peace, Sheriffs, and other necessary Officers, for administering of Justice, and putting the Laws in execution, provided Copies of such Establishments be transmitted to the King to be allowed; and with further power to the Governour to constitute and appoint Deputy Governours in the respective Islands

and Plantations, which then were, or should be under his Command, to all and every which respective Governours, the King by these Letters Patents gave power and authority to do and execute what should be commanded them by the Governour according to the power granted to him by this Commission: And the Governor's Authority to continue during the good will and pleasure of the King.

The Defendant further pleads, That after the making of the Letters Patents, and before the time of the Assault and Imprisonment, viz. 1 Mart. 33 Car. 2. he arrived at *Barbadoes*, and by virtue of the Letters Patents aforementioned, he took upon him and exercised the Government of that and the other Islands, and continued to do so till the first of May, 35 Car. 2. when he had licence to return to *England*.

That he, before his departure, by virtue of the said Letters Patents, by a certain Commission under his Hand and Seal, did constitute the Plaintiff, in his absence, to be his Deputy Governour in the said Islands of *Barbadoes*, to do and execute the Powers and Authorities granted to the Defendant by the said Letters Patents.

That the first of August following, the Defendant arrived at *London* in *England*, that the fourth of May, 35 Car. 2. after the Defendants departure, the Plaintiff took upon himself the Administration of the Government of the Island of *Barbadoes*; that the Plaintiff, not regarding the Trust reposed in him by the Defendant, nor the Honour of that Supreme Place and Office, did unlawfully and arbitrarily execute that Government and Office to the Oppression of the King's Subjects, viz. *apud Lond' præd in Par & Ward præd*.

That after the Return of the Defendant to the *Barbadoes*, viz. 6 Nov. 35 Car. 2. at a Council holden, for the Island of *Barbadoes*, at *St. Michael's Town*, before the Defendant *H. W. J. P. E. S. T. W. F. B.* which five are of the twelve named Council in the Letters Patents, and *Sir Timothy Thornhill* and *Robert Daves*, Counsel for the Island aforesaid, the Plaintiff then and there was charged, that he in the absence of the Defendant misbehaved himself in the Administration of the Government of the said Island; *Non tantum*, in not taking the usual Oath of Office, and not observing the Act of Navigation: And by his illegal assuming the Title of Lieutenant Governour, and altering and changing Orders and Decrees made in *Chancery* of the said Island, according to his own will and pleasure at his own Chamber, and altering the Sense and Substance of them, from what was ordered in Court by and with the consent of the Council: upon which it was then and there ordered in Council, by the Defendant and Council, that the Plaintiff *Sir John Wham* should be committed to, &c. until he should be discharged by due Course of Law: by virtue of which Order the Plaintiff, the said sixth of Nov. was taken, and detained until the 30th of Dec. upon which day he was brought to the Court of the General Sessions of *Oyer and Terminer*, and then by Court

Court recommitted, which is the same Assault, Taking, and Imprisonment, and Traverses *absque hoc*, that he was guilty of the Assaulting, Taking, or Imprisoning him within the time last mentioned at *London*, or elsewhere then in the Isle of *Barbadoes*, or otherwise, or in other manner then as before.

The Plaintiff demurred, and the Defendant joyn'd in Demurrer, and Judgment was given for the Plaintiff; and a *Venire* awarded *tam ad triand' exitum quam ad inquirend' de dampnis*, &c. and the Issue was found *pro querent'*, and 6 d. Damages, and on the Demurrer 500 l. Damages, and Judgment for Damages and Costs amounting in the whole to 590 l.

The Plaintiff, Sir J. Witham, dying, Trin. 2 Wil. & Mar. the Judgment was revived by *Scire Facias* brought by *Hemel, Gray, and Chaplain*, Executors of Sir J. W. *quoad omnia bona & catalla sua*, except one Debt due by Bond from *Henry Wakefield*. And at the Return of the *Scire Fac'*, the Defendant appears and demurs to the *Scire Facias*, and there is an Award of Execution, and thereupon a Writ of Error is brought in the *Exchequer Chamber*, and the Judgment was affirmed. Then a Writ of Error is brought in Parliament, and the General Error assigned.

And here it was argued on the behalf of the Plaintiff in the Writ of Error, that this Action did not lye against him, because it was brought against him for that which he did as a Judge, and so it appeared on the Record, according to 12 Rep. 25. that the Rule seems the same for one sort of Judge, as well as for another; that this Person was lawfully made a Governour, and so had all the Powers of a Governour; that this was a Commitment only till he found Security, tho' not so Expressed; that this is not countable here in *Westminster-hall*; that he was only censurable by the King; that the Charge is sufficient, in that Sir J. W. had not taken the Oaths; that *male & arbitrarie executus fuit*, is Charge enough to warrant a Commitment; that this was a Charge before a Council of State, and there need not be all the Matters precisely alledged to justifie their Acts; and by the same reason Actions may lye against the Privy Counsellors here, and enforce them to set forth every particular, which would be of dangerous Consequence; the Plea might have been much shorter, as only that he was committed by a Council of State, and the addition of the other Matters shall not hurt; and that the Charge was upon Oath shall be intended; no Presumption shall be, that the Supream Magistracy there did irregularly; tis a power incident to every Council of State to be able to commit: This action cannot lye, because the Fact is not triable here; the Laws there may be different from ours. Besides no Action lies unless 'twere a malicious Commitment, as well as causeless: and that no Man will pretend that an Action can lye against the chief Governour or Lieutenant of *Ireland* or *Scotland*, and by the same reason it ought not in this Case; he had a power to make Judges, and therefore he was more than a Judge; and they have confessed all this Matter by the Demurrer. The Statute of Car. 1. which restrains the power of our Council of State, sup-

poses that they could Commit; that in case of Crimes there they are punishable in that place; and in Sir *Ellis Ashburnham's* Case there was a Remanding to be tried there, and if so, it can't be examinable here; and if not, this Action will not lye. And further, that what was done here, was done in a Court; for so is a Council of State to receive Complaints against State Delinquents, and to direct their Trials in proper Courts afterwards; that there was never such an Action as this maintain'd; and if it should, it would be impossible for a Governour to defend himself: First, For that all the Records and Evidences are there. 2. The Laws there differ from what they are here; and Governments would be very weak, and the Persons intrusted with them very uneasie, if they are subject to be charged with Actions here for what they do in those Countries, and therefore 'twas prayed that the Judgment should be reversed.

On the other side, 'twas argued for the Plaintiff in the Original Action, That this Action did lye, and the Judgment on't was legal: That supposing the Fact done in *England*, the Plea of such Authority so executed at *Plymouth*, or *Portsmouth*, or the like, had been ill; for that Liberty of Person by our Law is so sacred, that every Restraint of it must be justified by some lawful Authority, and that Authority must be expressly pursued: That here was no Authority to commit; for that must be either as a Court of Record, or as Justices of Peace, Constable, or other Officer constituted for that purpose; that the Letters Patents are the only Justification insisted on, and that gives none; 'tis true, the power of Committing is incident to the Office of a Court; here's only the Government of the Place committed to Sir *Richard Dutton*, with a power to erect Courts, and appoint Officers, but none to himself: He in Person is only authorized to manage and order the Affairs; and the Law of *England* takes no notice of such an Officer, or his Authority; and therefore a Court of Law can take notice of it, no further, or otherwise, then as it doth appear in pleading: The Council is not constituted a Court; they are by the Letters Patents only to advise and assist the Governour; and the Governour hath no power to commit or punish, but to form and establish Courts to do so; which imports the direct contrary, that he had no such power: The Ends of appointing the Council, as mentioned in the Letters Patents, are quite different, *viz.* to aid the Regent by their Advice, not to act as of themselves; and if neither the Governour of himself, nor the Council of it self, had such a power, neither can both together have it: A Court of Justice is not to be intended, unless the same be specially shewn: Excepting the Case of the common known general Courts of Justice in *Westminster-hall*, which are immemorial; if any thing be justified by the Authority of other Courts, the same must be precisely alledged, and how their Commencement was, either by Custom or Letters Patents: Here it appears by the Plea it self, that they had Justices of Oyer and Terminer appointed: It doth not appear that he or the Council were

Judges

Judges of things of this kind. Besides, when a Council is constituted, as here was Twelve by Name, that must be the Majority, as is the Dean and Chapter of *Femes Case*, *Davis's Rep.* 47. and that's Seven at least, which are not in this Case. There must be a Majority, unless the Erection did allow of a less Number. The practise of the Courts of *Westminster-hall* do not contradict this, for there 'tis a Court, whether more or less, and so it hath been time out of Mind. But here's a new Constitution; and the Rule holds so in Commissions of *Oyer and Terminer*, if the direction be so: as is the Case in *Plowden* 384. the Earl of *Leicester's Case*. If a Mayor and three Aldermen have Conusance of Pleas, what a Mayor and two does is null and void. And if there be no direction in particular for the number, the Law requires the majority. So that here was no Council, because but five of them present.

The Council have not the power, but the Governour with the Advice and Assent of the Council; and so ought their pleading to have been according to their Case; That if a Man justifies as a Judge to excuse him from an Action, he must set forth his Authority, and the Cause must appear to be within his Conusance; and so are multitudes of Cases, 3 *Cro.* 130. 2 *Leon.* pl. 43. and 1 *Cro.* 153, 557, 579, 593. 12 *Rep.* 23, 25. *Mod. Rep.* 119.

But taking it as a Council, neither Person nor Thing are within its Jurisdiction; for if their Doctrine be true, that by being Governour, he is so absolute, as to be subject only to the King; then what Sir *John Witham* did, being while, and as Deputy Governour, which is the true Governour to all purposes *in absentia* of the other, is not examinable by a Successor. But admitting for the present, that by the Law one Magistrate may be punishable before his Successor for Miscarriages which were committed *colore Officii*; yet here are no such Miscarriages sufficiently alledged to be charged on him. 1. There's no pretence of an Oath, nor Circumstances shewing a reasonable Cause of Suspicion, one of which ought to have been. 2. In pleading no Allegation is sufficient, if it be so general, as the Party opponent can't in reason be supposed capable of making an Answer to it; and that is the true Cause why our Law requires Certainty: He did *male & arbitrarie* execute the Office to the Oppression of the King's Subjects. No Man living can defend himself on so general a Charge as this is: for if Issue had been taken thereon, all the Acts of his Government had been examinable, which the Law never allows: Then the Particulars are as general; 1. That he did not take the usual Oath; and it doth not appear what Oath, or if any was requirable of a Deputy Governour, nor who was to administer it; so that *non constat*, whether 'twas his Fault or the Governours; besides, that's no cause of Imprisonment, for any thing which appears in the Plea. 2. Assuming illegally the Title of Lieutenant Governour; that is so trivial, as it needs no Answer; for Deputy Governour and Lieutenant Governour are all one, *locum tenens* is a Deputy, & *e contra*. 3. Altering of Orders at his Chamber *ad libitum*, which were made in Court; not said that there was any such Court, or what Orders, or where made; & *non tantum* without *etiam* or *verum*

rum etiam, is not a sufficient positive Allegation: not said that he was guilty, but only charged; and not said how charged, whether with or without Oath, in writing or by parol: nor said to be in any such manner as that the Council ought or might receive it: tho' *Oath* be not necessary to be mentioned in the Commitment, yet it ought to be alledged in pleading, because 'tis necessary to warrant the Commitment, as was held in the Lord *Tarmouth's* Case in *B.R.* It could not be to secure his answering the same, for not so expressed; and 'tis not said that Sureties were demanded or denied, or that he had notice of the Charge; and surely this wasailable.

As to the Query, If conusable here; 'twas argued, That they had not pleaded to the *Jur*, nor any Matter to oust the Court of its *Jur*: If they intended by this Plea to have done that, they should have given *Jur* to some other Court in some other place, but this is not done; for if an Injury, 'tis relievable somewhere in the King's Dominions; and whether it be so, or not, is examinable somewhere: Now here is a Wrong complain'd of, as done by one English-man to another English-man, and a *Jur* attacht in the *King's Bench*, both of Cause and Person, by the Bill filed, and his Defence to it: besides *Jur* could not be examined in the *Exchequer Chamber*, because both the Statute and the Writ of Error expressly provide against it, and, this Writ of Error is founded upon that Affirmance, and therefore questionable, whether that could be insisted on here? But supposing it might, 'twas argued that the Action lies, for that 'tis a transitory Action, and follows the Person wheresoever he comes under the power of the Common Law Process: and that a Man may as well be sued in *England* for a Trespass done beyond Sea, as in *Barbadoes*, or the like place; as for a Debt arising there by Specialty, or other Contract, that no Body but *Prynne* ever denied it, and he did so only in case of Bonds dated there: That many Actions have been maintained and tried here for Facts done in the *Indies*, notwithstanding special Justifications to them, and the Trials have been where the Actions were laid: There was quoted *Dowdale's* Case, 6 Rep. 47, 48. and 7 Rep. 27. and if otherwise, there would be a failure of Justice in the King's Dominions, 32 Hen. 6. 25. vide *Jackson* and *Crispe's* Case, Sid. 462. 2 Keeble 391, 397.

'Twas then argued, That whatsoever question might be made about the Trial of the Issue; if one had been joyned; yet now Demurrer being to the Plea, if that Plea be naught, then the Plaintiff is to have Judgment upon his Declaration, and that is all right.

It was further said, That the Justification of such a tort or wrong ought to be according to the Common Law of *England*, for that *Barbadoes* is under the same Law as *England*; and if 'twere not, upon his pleading it must be intended to be so; and tho' they should be intended different, yet the Defendant in the Action was obliged to the same Rules of Pleading: for tho' the Matter may justify him for an Act done there, which would not justify him for the same Act done here, yet he must shew that he hath pursued

pursued the Rules of Law in that place ; or in case of no positive Laws, the Rules of Natural Equity : for either the Common Law, or new instituted Laws, or natural Equity, must be the Rule in those places.

'Twas agreed, That according to *Calvin's Case*, 7 Rep. 17. upon the Conquest of an Infidel Country, all the old Laws are abrogated *ex instanti*, and the King imposes what he pleases ; and in case of the Conquest of a Christian Country, he may change them at pleasure, and appoint such as he thinks fit ; tho' *Coke* quotes no Authority for it, yet 'twas agreed, that this might be consonant to reason. But 'twas denied that *Barbadoes* was a Conquest, 'twas a Colony or Plantation, and that imports rather the contrary ; and by such Names these Plantations have always gone in Letters Patents, Proclamations, and Acts of Parliament. But whatsoever may by some be said as to Statutes in particular binding there, the Common Law must and doth oblige there, for 'tis a Plantation or new Settlement of English-men by the King's Consent in an uninhabited Country ; and so is the History of *Barbadoes* written by *Richard Ligon*, Printed at London 1673. pag. 23. says he, 'Twas a Country not inhabited by any, but overgrown with Woods. And pag. 100. They are governed by the Laws of *England*. And *Heylin* in his *Geography*, lib. 4. 148. says, The *English* are the sole Colony there ; they are called the King's Plantations, and not his Conquests ; and he neither could, nor can now impose any Laws upon them different from the Laws of *England*. 'Twas argued that even our Statutes do bind them, and many of them name these Plantations as *English* ; they have some Municipal Rules there, like our By-laws in the *Stanneries* or *Fenns* ; but that argues nothing as to the general ; which shall prevail when the one contradicts the other, may be a Query another time.

By the 22 & 23 Car. 2. cap. 26. against the planting of Tobacco here, and for the Regulation of the Plantation Trade, the Governours of those Plantations are once a Year to return to the Custom-house in London an Account of all Ships laden, and of all the Bonds, &c. And they are, throughout the whole Act, called the King's *English* Plantations, Governours of such *English* Plantations, to some of the *English* Plantations. And Paragr. 10. 'tis said, Inasmuch as the Plantations are inhabited which his Subjects of *England* ; and so 'tis in 15 Car. 2. cap. 7. sect. 5. and in 12 Car. 2. cap. 34. they are called Colonies and Plantations of this Kingdom of *England*. From all which 'tis natural to infer, That the Rules in case of conquered Places cannot prevail here ; Conquest *est res odiosa*, and never to be presumed ; besides, 'tis the People, not the Soil, that can be said to be conquered. The reason of a Conquerour's Power to prescribe Laws, is the Conqueror's Clemency in saving the Lives of the conquered, whom, by the strict right of War, he might have destroyed ; or the presumed Chance of Subjection, which the conquered Prince and People threw themselves upon, when they first engaged in the War. But this is not pretended to here, tho' all the Cases about this Subject were put

put below stairs : Then taking it as the truth is, certain Subjects of *England*, by consent of their Prince, go and possess an uninhabited desert Country, the Common Law must be supposed their Rule, as 'twas their Birthright, and as 'tis the best, and so to be presumed their Choice ; and not only that, but even as obligatory, 'tis so. When they went thither, they no more abandoned the *English* Laws, then they did their Natural Allegiance ; nay, they subjected themselves no more to other Laws, than they did to another Allegiance, which they did not.

This is a Dominion, belonging not only to the Crown, but to the Realm of *England*, tho' not within the Territorial Realm. *Vaughan* 330. says, That they follow *England*, and are a part of it. Then 'twas argued further, If 'twere possible that it should be otherwise, when did the Common Law cease ? On the Sea it remained in all Personal Respects ; If Batteries or Wounds on Ship-board, Actions lay here : Then the same held when they landed there, and no new Laws could be made for them but by the Prince with their consent.

Besides, Either the Right of these Lands was gained to the Crown, or to the Planters, by the Occupancy ; and either way the Common Law must be their Rule : It must be agreed, that the first Entry gained the right, and so is *Grotius de jure Belli & Pacis*, lib. 2. cap. 8. sect. 6. and these Lands were never the Kings, tho' they afterwards submitted to take a Grant of the King. 'Tis true, in case of War, what is gained, becomes his who maintained the War, and doth not of right belong to that Person who first possessed it, *Grot. lib. 3. cap. 6. sect. 11*. But in case it be not the effect of War, but only by force of their first Entry, it must be considered what Interest they did acquire, and certainly 'twas the largest that can be ; for an Occupant doth gain an Inheritance by the Law of Nations, and the same shall descend ; then by the Rules of what Law shall the Descent be governed ? it must be by the Laws of the Country to which they did originally, and still do belong. But then supposing the Lands gained to the Crown, and the Crown to distribute these Lands, the Grant of them is to hold in Soccage, and that is a common Law Tenure ; why are not their Persons in like manner under the Common Law ? When a Governour was first received by, or imposed upon them, 'twas never intended, either by King or People, that he should Rule by any other Law than that of *England*. And if it had been known to be otherwise, the number of Subjects there would have been very small. In these Cases their Allegiance continues, and must be according to the Laws of *England* ; and 'twas argued, that *ex consequenti* the protection and rule of them ought to be by the same Laws, for they are mutual and reciprocal, *unum trahit alterum* ; and that Law which is the Rule of the one, should be the Rule of the other ; besides, 'tis the Inhabitants, not the Country, that are capable of Laws, and those are *English*, and so declared and allowed to be ; and consequently there's no reason why the *English* Laws should not

not follow the Persons of English-men, especially while they are under the *English* Government, and since the Great Seal goes thither. And further, a Writ of Error lies here upon any of their ultimate Judgments; for says *Vaughan* 402. and 21 *Hen.* 7. 3. that it doth so to all Subordinate Dominions; and tho' the distance of the Place prevents the common use of such Writ, yet by his Opinion it clearly lies; and he reckons the Plantations part of those Subordinate Dominions. Now a Writ of Error is a remedial Writ, whereto Right is to be done, and that must be according to the Laws of *England*; for the *King's Bench*, in case of a Reversal upon such Writ, is to give a new Judgment; as by Law ought to have been first given. *Vaughan* 290, 291. says, It lies at Common Law to reverse Judgments in any inferiour Dominions; for if it did not, inferiour and Provincial Governments might make what Laws they please; for Judgments are Laws when they are not to be reversed. It lay to *Ireland* by the Common Law, says *Coke* 7 *Rep.* 18. tho' there had been no Reservation of it in *King John's* Charter. Then it was inferred, that the lying of a Writ of Error proves the Laws to be the same; i. e. in general the Common Law to govern in both places, from the difference assigned between *Ireland* and *Scotland*; it lies not to *Scotland*, because a distinct Kingdom, and governed by distinct Laws; and it lies to *Ireland*, because ruled by the same, and consequently if a Writ of Error lies on the final Judgment there, it's a good Argument that the same Law prevails there. These Plantations are parcel of the Realm, as Counties Palatine are; Their Rights and Interests are every day determined in *Chancery* here, only that for necessity and encouragement of Trade and Commerce, they make Plantation-Lands as Assets in certain Cases to pay Debts; in all other things they make Rules for them according to the common Course of *English* Equity: The distance, or the contiguity of the thing, makes no alteration in the Case. And then 'twas said, as at first, That this then was the same case, as if the Imprisonment had been in *England* or on Shipboard, as to the Rules of Justification; that if there were another Law, which could Justifie it, the same ought to have been certainly pleaded. As to the Instructions, these do not appear, and therefore are not to be considered in the Case, and they should have been set forth, and no extraordinary Power is to be presumed, unless shewn, for every Man in pleading is thought to make the best of his own Case, and consequently that if 'twould have made for him, the same would have been shewn; and because they are not shewn, they must be thought directive of a Government according to the Laws of *England*, since 'tis to a Subject of this Realm to govern other Subjects of this Realm, living upon a part of this Realm, and from the King thereof, who must be supposed to approve those Laws which make him King, and by which he reigns. Then

Then 'twas argued, Suppose this Governour had borrowed Money of a Man in the Island, and then had returned to England, and an Action had been brought for it, and he had pretended to ustifie the receipt of it as Governour; he must have shewn his Power, the Law, and how he observed that Law, the like for Goods; the same reason for Torts and Wrongs done *vi & armis*.

Now the Court below could consider no other Power or Law to justifie this act, but the Common Law of England; and that will not do it for the Reasons given; and if it be justifiable by any other, it must be pleaded; and what he hath pleaded is not pursued, &c.

As to the Commitment by a Council of State, what it means is hardly known in the Law of England; and that Authority which commits by our Law, ought to be certain, and the Cause expressed, as all the Arguments upon the Writ of *Habeas Corpus* in old time do shew; but here's no Council: and 'tis not said so much, as that he was *debito modo oneratus*: And as to the Demurr', that confesses no more then what is well pleaded: And as to Consequences, there's more danger to the Liberty of the Subject, by allowing such a Behaviour, then can be to the Government by allowing the Action to lye: And therefore 'twas prayed that the Judgment might be affirmed.

It was replied on behalf of the Plaintiff in the Writ of Error, That notwithstanding all that had been said, the Laws there were different, tho' the Foundation of them was the Common Law that they would not enter into that Question, What sort of Title at first gave Right to these Lands? but that this was a Commitment by a Council of State: And, as to the Objection of too general Pleadings *in male & arbitrario exercendo*, &c. tho' the inducement of the Plea was so. There were other Matters more particularly pleaded; the altering the Decrees in his Chamber, which was sufficient: And as to the Objection, That 'tis not alleged in the Pleadings, that the Charge in Council against *Wytham* was upon Oath; they answered, That 'tis not essential, tho' prudent, to have the Charge upon Oath before Commitment; Matters may be otherwise apparent. And as to the Objection, That the Warrant of the Council for the Commitment was not shewn; they said that it lay not in their power, because 'twas delivered to the Provost Marshal, as his Authority, for the Capture and Detention of him, and therefore did belong to him to keep: And that the Council, tho' they were not a Court, yet they had Jurisdiction to hear the Complaint, and send him to another Court that could try the Crime; and tho' it did not appear that the King gave any Authority to the Governour and Council to commit, yet 'tis incident to their Authority, as being a Council of State, the Council here in England commit no otherwise: and where the Commitment is not authorized by Law, the King's Patent gives no power for it: But the Government must be very weak, where the Council of State cannot commit a Delinquent, so as to be forthcoming.

coming to another Court that can punish his Delinquency: And therefore prayed that the Judgment should be reversed, and the same was accordingly reversed.

Philips *versus* Bury.

WRit of Error to reverse a Judgment given for the Defendant in the Court of *King's Bench*, where the Case upon the Record was thus; *Ejectione firme* on the Demise of *Painter* as Rector, and the Scholars of *Exeter Colledge* in *Oxon*, for the Rector's House. The Defendant pleads specially, That the House in question is the Freehold of the Rector and Scholars of the Colledge; but he says, That he, the said Dr. *Bury*, was then Rector of that Colledge, and that in right of the Rector and Scholars he did enter into the Messuage in question, and did Eject the Plaintiff, and so holds him out; *absque hoc*, That *Painter* the Lessor of the Plaintiff, was at the time of making the Lease, in the Declaration, Rector of that Colledge, & *hoc paratus est verificare*, &c.

The Plaintiff replies, That the Messuage belongs to the Rector and Scholars, but that *Painter* the Lessor was Rector at the time of the Lease: & *hoc petit quod inquiratur per Patriam*, &c. and thereon Issue is joyned, and a Special Verdict.

The Jury find that *Exeter Colledge* is and was one Body Politick and Corporate, by the Name of Rector and Scholars *Collegij Exon' infra Universitat' Oxon'*, that by the Foundation of the Colledge there were Laws and Statutes by which they were to be governed; and that the Bishop of *Exeter*, for the time being, and no other, at the time of founding the Colledge, was constituted by virtue of the Statute concerning that Matter hereafter mentioned, ordinary Visitor of the same Colledge, *secundum tenorem & effectum statuti eam rem concernent*, That the Bishop of *Exeter*, who now is, is Visitor according to that Statute. Then they find the Statute for the Election of a Rector *prout*, &c.

Then they find the Oath required of the Rector, That so long as he should remain in that Office, he should be true and faithful to the Colledge, and its Lands, Tenements, Possessions Ecclesiastical and Secular, Rights, Liberties and Priviledges, and all its Goods, moveable and immoveable, would keep and defend, and all the Statutes, Ordinances, and Customs of the Colledge he would observe, and endeavour that they should be observed by all Scholars, Graduates and Under-graduates, &c. That he would occasion no Trouble or Grievance to any of the Scholars *contra justitiam charitatem & fraternitatem*, But according to the best of his Judgment and Conscience, he would cause due Discipline to be used according to the form of the Statutes of the

Colledge: That he would maintain and defend all Suits for the Colledge, but never begin one wherein any Disadvantage or great Prejudice may happen to the Colledge, without the deliberate consent of the major part of the Fellows. And if any variance happen between him and the Scholars, and the same be not ended within ten or twenty Days, by the Sub-rector, Dean, and three Senior Scholars of the Colledge, that then he would stand to the direction of the Chancellor, or in his absence, of the Vice-Chancellor or his Commisary, and his Award would faithfully observe, *Et si contigerit me in posterum propter mea demerita, seu causas in statutis contentas iuxta formam statutorum ab officio meo expelli seu alias amoveri, omnibus & singulis juriis & factis respectis per quae vel quae petere me possem reconciliari vel in integrum restitui circa praemissa quantumcunque aliis probitatis & vitae merita mihi suffragentur in vim pacti renuncio in his scriptis*, and that he would observe the Statutes, according to the plain Grammatical Sense, &c.

Then they find another Statute, *Si quis Scholarium vel Electorum*, be convicted of Adultery, Incontinency, heresy pertinacity, wilful Homicide, manifest Perjury, frequent Drunkenness, *alteriusque publicae turpitudinis*, before the Rector, Sub-rector, Dean, and five other Senior Scholars, or the major part of them, with the consent of the said Rector, he shall be *ipso facto* expelled, *nulla alia monitione praemissa*. And in the same Statute (which is intitled *de causis propter quas Scholares privari debeant, & de dissensionibus sedandis*) 'tis farther established, *quod si aliqua discordia irarum aut dissensionis materia (quod absit) in dicto Collegio suborta sit, qualitercunque inter quoscumque Scholares, aut alios in dicto Collegio morantes, nisi sic dissensiones intra unum diem intra se concordantur tunc celerius cautius & melius quo fieri potuit per praedictum Rectorem, vel in ejus absentia Sub-rectorem, & tres Scholares, ex praesentibus in Collegio omnino Seniores intra biduum sedetur & pacifcetur hujusmodi dissensionis, si vero ipsi ad eandem sedandam non sufficiant, tunc Rector (assumpta sibi Sub-rectore, Decano, & aliis quinque Scholaribus omnino Senioribus per quos verissimè sedari poterit) summarie & de plano eam examinet scilicet finis discordiae, ire, dissensionis, & jurgij hujusmodi favore, partialitate, ira, odio, & invidia quibuscunque cessantibus intra tres dies lapsum illius bidui immediate sequentes imponatur & quicquid Rector cum praedicta vel major parte eorundem duxerit ordinandum & agendum per partes discordantes firmiter in virtute eorum juramenti observetur & executioni absque contradictione cujuscunque demandetur: nec liceat alicui de dicto Collegio cujuscunque gradus aut status extiterit occasione rixae jurgij aut dissensionis intra dictum Collegium aut extra intra easdem ortu vel mote prosecutionem facere, aut litem aliquam movere vel aliquem impetere, aut ad iudicium trahere coram aliquo iudice extrinseco Ecclesiastico vel Seculari sed volumus omnino quod hujusmodi jurgia ire rixae discordiae & dissensiones (quae per Dei gratiam raro aut nunquam contingent) per personas praedictas aliqua ordinatione bona seu concordia terminentur & finiantur.*

The Jury finds, That from the Foundation of the Colledge there was, and yet is, *quidam ordo Scholiarium, vocat' veri & perpetui Scholares*, and that by the Statutes, every Scholar who hath passed his Probation Year, and is approved to be a true and perpetual Scholar, shall take an Oath before the Rector, or in his absence before the Sub-rector, &c. to observe the Statutes of the Colledge, and to endeavour that others observe them too, or otherwise to undergo the Penalties on them inflicted, without contradiction, according to the true form and effect of these Statutes: To obey all Injunctions, Expositions, and Construtions by the Reverend Bishops, Successors of the first and original Founder, *super dubiis Statut' emergentibus ad eosdem Episcopos ex consensu Rectoris & majoris partis Scholiarium delat' faciendis*: to be true to the Colledge, neither to do, nor wittingly to suffer to be done, any Prejudice, Damage, or Scandal to the same, to obey, assist, and reverence the Rector, Sub-rector, &c. and other Superiours, Scholars *in licitis ac honestis & maxime in eorum conventionibus & in negotiis Collegij quatenus Statuta jubent aut requirant* effectually to obey all Directions and Orders of the Rector, Sub-rector, &c. to maintain and defend the Rights and Liberties, the honesty and good fame of the Colledge, and its Scholars, &c. *Item si contingat me posthac per Rectorem aut in hujusmodi rebus habentes interesse corrigi, & puniri, aut a dicti Collegii sustentatione ejici & expelli, excludi, privari, vel amoveri preter mea forsan demerita, ipsum Rectorem seu alias personas seu eorum aliquem, occasione expulsionis vel correctionis hujusmodi nunquam prosequar', molestabo, vel inquietabo, per me alium vel alios, seu ab aliis prosequi vel molestari seu inquietari ea de causa quantum in me fuerit permittam: sed sponte simpliciter vel absolute, omni actioni, contra Rectorem aut alios dicti Collegij Scholares quomodo libet appellationi & querele in ea parte faciendis, ac quorumcumque literar' impetrationi precibus principum, prelatorum, procerum, magnatum, & aliorum quorumcumque quibus poss' ad jus titulum & possessionem vindicandum reconciliari, ac quibuscumque juris & facti remediis per que me petere possem integrum restitui, quantumcumque alias mihi probitatis & vite merita suffragantur, in vim pacti renuntio*. To be just and impartial in Election of Scholars, not to reveal the Secrets, &c. not to desert the Colledge to be of another, without license, &c.

The Jury further finds, That according to the Statutes there are probationary Scholars, who are to be such for a Year, before they be admitted to be true and perpetual Scholars, and that every one chosen in for a Probationer, shall swear that he cannot certainly expend above four Marks per Annum, to be true to the Colledge, and not to reveal Secrets to its scandal, prejudice, or danger; not to make or procure any Conventicles, Conspiracies, or Contracts against the Ordinances and Statutes of the Colledge, or the honour of the Colledge or the Rector, &c. to promote Peace there, & *si contingat me (quod absit) juxta formam & exigentiam Statutor' a predicto Collegio expelli seu amoveri per Rectorem & alias person' in hujusmodi expulsionem interesse habentes, &c.* in like manner as the perpetual Scholars swear. Then

Then the Jury find the Statute *de Visitatione*, reciting how prone Mankind is to Evil, and Time changeth the best things, and that 'tis impossible to make Laws, but by Mis-construction, Fraud, or other Practise may be dissolved, that he confided in the Bishops of Exeter his Successors (*quos dicti Collegij Patronos & visitatores relinquimus*) that those who are brought thither through fervent Charity, being inflamed with Christian Faith, might watch to the preserving that Nursery, that the Statutes and Ordinances of the Colledge might be studiously observed, Vertue and Learning be nourished, their Possessions and Goods, spiritual and temporal, may flourish, their Rights, Liberties, and Priviledges may be defended: *Ea de causa liceat Domino Episcopo Exon' qui pro tempore fuerit, & nulli alij nec alio quoties per Rectorem dicti Collegij & in ejus absentia Sub-rectorem & quatuor alios ad minus ex septem maxime senioribus Scholaribus fuerit requisitus, necnon absque requisitione nulla de quinquennio in quinquennium semel ad dictum Collegium per se vel suum Commissar' quem duxerit deputandum, libere accedere; cui quidem Reverendo----* He gives full power upon all Articles in the Statutes contained, and other Articles concerning the Estates, Honours, or Profits of the Colledge, to interrogate and examine the Rector, Scholars, and elect, and to compel them by Oath, and Censures if need be, to say the Truth, and all Crimes and Offences of the said Colledge whatsoever, *Commissa & in ea visitatione Comperita*, according to the quality of the Offence to punish and reform, and to do all things requisite *quoad eorum correctionem & reformationem etiamsi ad deprivationem seu amotionem Rectoris Sub-rectoris aut alterius cujusquam ab administratione sua vel officio sive ad amotionem alicujus Scholaris vel Electi ab eodem Collegio, Statut' & Ordinationibus id exigentibus, procedere contingat: Stat' insuper,* that none in dictis visitationibus in dicto Collegio faciend' contra Rectorem Sub-rectorem aut aliquam alium ipsius Collegij quemcunque dicat deponat seu denunciat nisi quod verum crediderit seu de quo publica vox vel fama laboraverit contra eundem in virtute juramenti ab eo prius Collegij prestiti: Ordinantes preterea ut Dominus Episcopus Exon cum in persona propria visitare aut premiss' facere dignatur, Rector & duo Scholares ex presentibus maxime Senioribus unam in Collegio refectionem quadraginta solidor' expensas non excedentem eidem Episcopo humiliter & reverenter offerent. Commissario autem cum premissa fecerit duas refectiones in Collegio vel viginti solidos per manus Rectoris de bonis Collegij persolvi concedimus pro omnibus laboribus & expensis in hanc Causam tam in itinere quam in Universitate tempore hujus visitationis. Itaque Dominus Episcopus quadragini solid' Commissarius vero viginti solid' in uno & eodem anno pro actu visitationis ad sumptus Collegij non excedat; nec inceptam aliquam visitationem ultra duos dies proxime sequentes, aut ex causis urgentissimis & rarissimis ultra tres dies prorogari aut continuari ullo pacto volumus sed lapso & acto illo biduo & quando de causis predictis ulterius prorogatur triiduo transacto ea ipsa visitatio illa pro terminata & dissoluta habeatur.

Et si quæ in ea comperirent corrigenda & reformanda quæ breuitate temporis corrigere & reformari non potuerint, ea rectori in scriptis tradat, qui ea omnia secundum formam & exigentiam statutorum sine dilatione quantum in eo erit corrigere & reformare tenebitur sub pena contemptus: Then in the Name of Jesus, and as they will answer it at the last Tribunal, that neither for fear, hatred, favour, ill-will, vel prece, vel pretio, they do or neglect todo any of the Premises, &c.

Statuimus preterea, ut Rector subrektor scholares aut alius quispiam cuiuscunque sortis dicti collegii super Excessibus vel delictis in Visitationibus & inquisitionibus per dictum Episcopum Exon vel ejus commissarium ut permittitur faciendis accusatus vel detectus copia compertorum vel detectorum hujusmodi traditi aut ostendi aut nomina detegentium non ostendantur: sed sup' iisdem compertis aut detectis statim coram Episcopo vel ejus commissario personaliter respondeat ac correctionem debitam subeat pro eisdem secund' tenor' statuti cessantibus quibuscunque, provocationibus appellationibus querelis & aliis juris & facti remediis per quæ ipsius correctio & punitio deferri seu impediri valeat.

Si tamen ad privationem aut inhabilitatem rectoris aut expulsionem scolæ alicujus per Episcopum aut ejus commissarium agatur: tunc ostendantur ei delicta, quibus si non potuerit rationabiliter & honeste respondere suamque innocentiam probabiliter ostendere, & sese super objectis juste purgare, amoveatur sine appellatione aut ulteriori remedio; Dummodo ad ejus expulsionem concurrat consensus Rectoris & trium ex septem maxime senioribus Scholaribus tunc in universitate presentibus; sine quorum consensu irrita sit hujusmodi expulsio & nulla ipso facto: & in sup' si contra Rectorem ad amotionem ab officio per hujusmodi Domini Episcopi commissarium, etiam consentientibus quatuor ex septem maxime senioribus supradictis procedat non negamus ei omnes exceptiones defensionem justas & honestas, apud ipsum Dominum Episcopum Exon dummodo ulterius non appellat, non obstante hac ordinatione prædicta aut aliis quibuscunque.

The Jury further find, that in another Statute, propter quas causas Rector officio privari debet. It is thus, Cum bono providoque Rectore nihil sit utilis; & imprudenti, inepto, indigno, penitus inhabili, criminoso nihil sit detestabilius: statuimus ut Rector quicunque propter terrarum, tenementorum, reddituum, possessionum spiritualium aut temporalium sua culpa diminutionem seu alienationem, vel propter detractionem ablationem alienationem illicitam bonorum & rerum ipsius Collegii, infamiam, adulterium incontinentiamque negligentiam intolerabilem, heresim pertinacem homicidium voluntarium, perjuriam manifestam, crebram ebrietatem, & propter longiorem absentiam a Collegio quam Statuta permittunt, vel procuracionem sui sibi officii per largitiones inhonestas datas dandas vel promissas, vel quacunque via aut modo illicito, & propter usuram, simoniam, aliamve causam ipsum Rectorem reddentem criminulter irregularem vel aliter penitus inhabilem; necnon propter infirmitatem infectam & contagiosam perpetuam, cujus occasione non poterit absque scandalo officium hujusmodi exercere, ab eo penitus amoveatur, Ad cuius amotionem hoc modo procedatur,

viz. ut statim vel saltem inter quindecim dies postquam aliquid premissor commiserit vel in eorum aliquod inciderit, primo per subrectorem, assistentibus ei quinque scholaribus maxime senioribus dicti Collegii moveatur Rector eiq; bonis rationibus suadeant ad voluntarie cedendum officio: quod si sponte inter triduum cedere noluerit, tunc intra octo dies post huiusmodi monitionem subrectoris assensu & testimonio omnium perpetuorum scholarium dicti Collegii, vel saltem majoris partis eorundem, denunciabit Domino Episcopo Exon qui pro tempore fuerit, per duos ipsius Collegii scholares omnino seniores, cum litteris aliquo sigillo authentico, ac signo & subscriptione alicujus Notarii publici signatis, vel saltem loco sigilli authentici, subscriptione subrectoris, ut prefertur, & majoris partis scholarium ac notarii publici signo communis causas defectus crimina excessus vel enormia Rectoris continentibus, proviso quod omnes huiusmodi attestantes, ac testimonium perhibentes, prius tactis sacrosanctis Dei Evangelis coram subrectore, ipso primum id coram illis presentante, ac deinde a singulis eorum id exigente, jurabunt, quod non per invidiam, malitiam odium vel timorem, nec for love nor honour of any other to be promoted to the place, nor for Emulation nor Envy, or by Conspiracy or the procurement of any other they did testify it, but merely from a good zeal and love for the College, and the good Estate thereof: that the Bishop or his Vicar, de causis criminibus excessibus & defectibus contra rectorem propositis summam & de plano & extra strepitum judicalem cognoscat, and if by sufficient proof he find the Accusation true, he shall immediately remove him from his Office and Administration, and enjoyn the Scholars to proceed to the Election of a new Rector, according to the form of the Statute aforesaid: Cessantibus appellationibus querelis aut ejunctisq; alterius Juris & facti remediis quibus huiusmodi amotio valeat impediri aut differri, que omnia irrita esse volumus Statimus & decrevimus ipso facto.

The Jury find further, that Queen Elizabeth, I. Martii anno regni ejus octavo, makes this House which was before a Hall, to be a College, and confirms the Statutes, and constitutes them a Body Corporate, and that one Sir William Petre, being willing to supply the wants of the College, makes addition to the Revenue, and to some defective Statutes, &c.

Then they find that before the time of the demise in the Declaration, viz. 16. Octob. Ann. W. & Mar. 1. one James Colmer, A. M. was Convicted before the Rector, Sub-Rector, and five Seniors, of Incontinency, with one Ann Sparrow, and therefore was Expelled; that he Appealed to the Bishop of Exeter; that 21st of February, 1689. he made his Commission to Dr. Masters, which Commission, is found in *hec verba*, reciting that tis complained by C. that he was unjustly Expelled, and therefore appoints Dr. Masters to hear and determine the same: that the Commissary proceeds to the execution of that Commission and 22th Martii, he comes to the College and sits in the Chappel with a notary publick, and Colmer appears, and the Rector and the rest did not; then he Adjourns to the Hall, and Summons all the Parties

Parties to attend there, and there Dr. *Bury* made and exhibited a Protestation in Writing under their Hands, setting forth the Oath of a Fellow not to Appeal and Protest against his Authority, to examine it; thereupon, the Doctor proceeds and examines the Fact *ex parte*, and Reverses the Sentence, and Restores *Colmier*, viz. 25 *Martij*, because the Process was not transmitted,

Then they find that the 16th of *May*, the Bishop issued his Citation to the Rector, or Sub-Rector, for a General Visitation, to be held the 16th of *June*, in the Chappel of the Colledge; and accordingly the 16th of *June*, the Bishop comes to the Colledge, and to the Door of the Chappel, which was shut up; and that the Porter was subject to the Government of the Rector, and bound to obey his Commands, in shutting or opening the Doors; and certain of the Scholars did then offer in *area Collegij*, a certain Writing under their Hands, protesting against the Visitation, as within time, by reason of Dr. *Masters's* Visitation: This is refused by the Bishop: The Bishop then Administred an Oath to *Webber*, of the Service of Citation; and then he called over the Names of the Rector and Scholars who appeared not; and not being admitted into the Chappel, he departed.

Then upon the 21st of *July*, he Summons a Visitation upon the 24th of *July*, and the 23th of *July*, the Rector, &c. protested against the intended Visitation, insisting on their Statutes, which by Oath they are bound to observe, and this under their Common Seal. Then the Bishop upon the 24th of *July*, receives the Protestation, *quatenus de jure*; then they departed, refusing to agree to his Visitation; Ten of the Fellows appeared, and submitted; the rest were pronounced *Contumacious* for not appearing: Then he Administred several Interrogatories, to discover Matter of Accusation against the Rector and Fellows. In the Afternoon the Absentees were called again, and declared in Contempt, and the Fellows Suspended, and Adjourned to the 25; and then Dr. *Herne* was deprived for having a Living inconsistent with his Fellowship; Dr. *Bury* is pronounced *Contumacious*, *sed de poena in eum infligenda duxit deliberanda*. Then the 24th he calls for the Act, *actum quendam coram eo decimo sexto die Julij ult' Elaps' die alias statui' pro visitatione hujus Collegij expedit' eundemque actum pro parte process' hujus negotij visitationis haberi decrevit*. Then he Adjourns to the 26th, and then he deprives Dr. *Bury* for Contumacy, with the Consent of Four of the Seven Senior Fellows not Suspended; Twelve having been Suspended. And they find further, That the Four Fellows which Subscribed the Sentence of Deprivation, were not of the Senior Fellows, unless by the Deprivation of Dr. *Herne*, and the Suspension of *George Vernon*, *Thomas Lethbridge*, *Benjamin Archer*, *Samuel Adams*, and *Philip Thorne*; all which six, half the number of the Suspended, were Seniors to the Consenting Scholars.

Then they find that after this Sentence, Painter was elected into the Rectorship, *Concurrentibus omnibus requisitis; si prædict' Officium Rectoris eo tempore fuit vacans;* and that Dr. Bury, 1 June, Anno Jac. 2. *& semper postea usque sententiam prædict': si sententia in contrar' non valeat semper postea fuit & adhuc est verus & legitimus Rector Collegij prædict'.*

That William Painter as Rector, and the Scholars of the said Colledge did make the Demise in the Declaration, and thereon the Plaintiff entered, and Dr. Bury enters on him, and holds, and yet doth hold him out, *modo & forma prout in nar', &c. sed utrum super totam materiam prædict' locus Rectoris per privation' prædictam prædict' Arthur' legitime vacavit nec ne the Jury are ignorant, & si per inde locus prædict' legitime vacavit tunc pro querent' & si non, tunc pro Defendent'.*

It was argued on the behalf of the Plaintiff in the Writ of Error, That this Judgment was illegal; and the general Question was, Whether this Sentence of Deprivation, thus given by the Visitor against Dr. Bury, did make the Rectorship void as to him, and so consequently gave a Title to the Lessor of the Plaintiff. But upon this Record the Questions were two: 1. Whether or no by the Constitution of this Colledge, the Bishop had a Power in this Case to give a Sentence. 2. Supposing that he had such a Power, Whether the Justice of that Sentence were examinable in *Westminster-hall* upon that Action?

And it was argued, That the Bishop had such a Power to give a Sentence; and it was agreed that he could make his Visitation but once in five Years, unless he be called by the Request of the Colledge; and if he comes uncalled within the five Years, his Visitation would be void. But yet the Visitation of the 24th of July was a good Visitation, and consequently the Sentence upon it is good; that there was no colour to make Dr. Master's coming in March to examine Colmer's Appeal upon the Visitor's Commission, to be a Visitation; and that because it was a Commission upon a particular Complaint, made by a single expelled Fellow, for a particular Wrong and Injury supposed to be done to him, and not a general Authority to exercise the Visitatorial Power, which is to inquire into all Abuses, &c. Colmer complains that he was expelled without just Cause, and seeks to the Visitor, for redress, they having expelled him for an Offence, of which he thought himself innocent; and the Visitor sends his Commissary to examine this particular matter. Then it was urged, That tho' a Visitor be restrained by the Constitutions of the Colledge, from visiting *ex officio*, but once in five Years; yet as a Visitor, he had a constant standing Authority at all times to hear the Complaints, and redress the Grievances of the particular Members; and that is part of the proper Office of a Visitor to determine particular Differences between the Members, and thus is *Littleton's Text, fol. 136.* that complaint may be made to the Ordinary or Visitor, praying him that he will lay some Correction and Punishment for the

the same, and that such Default be no more made, &c. And the Ordinary or Visitor of right ought to do this, &c. and so was it held in *Appleford's Case* in the Court of *King's Bench*, who was expelled upon a like occasion as *Colmer* was; he appealed to the Bishop of *Winton*, who was Visitor, and he confirmed the Expulsion, and held to be good upon the Appeal; for the hearing of Appeals is a standing, fixed, constant Jurisdiction. Visiting is one Act or Exercise of his Power, in which he is limited as to time; but redressing of Grievances is another, and his proper Office and Business at all times. 'Tis the Case of all the Bishops of *England*, they can visit by Law but once in three years, but their Courts are always open to hear Complaints and Determine Appeals; so that here, tho' but one Visitation can be in five years without request, yet the Power and Authority to hear and examine any difference between the Members, and to relieve against any particular Injury, that's continual, and not limited.

Then 'twas argued, That tho' what was done upon the 16th of *June*, was with an Intention to Visit, yet being denied to enter the Chappel, where the Visitation was appointed to be held, it was none; and his Calling over the Names, was only to know who hindred the Visiting; and his making an Act of it afterwards, or administering an Oath at the time, can never be called one; tho' it hath been below said to be a taking that of *June* to that of *July*: but that cannot be, for then it continued much longer than was intended; nay, much longer, then it can by the Statutes of the Colledge, for that is to cease in three days.

It turns rather the other way; having been hindred in *June*, he makes an Act of it in *July*, in order to call them to an account for it, as for a Contumacy, and to bring them to Judgment at his Visitation: 'Twas no more then taking an Affidavit of the Service of a Citation.

The appointment of a Visitation in the Hall was occasioned by the Obstruction met with at the Chappel; and 'twould be a very strange Construction, that when he designed a Visitation, and was hindred, that the Hinderance and his Inquiry about it should be called a Visitation; and a former Contumacy in opposing an intended Visitation, should prevent their being subject to an actual true one.

Then 'twas argued, That there was no necessity that there should be the Consent of the four Senior Fellows to the Deprivation of the Rector; and by one of the Counsel 'twas owned, that if such Consent had been necessary, the Sentence had been a Nullity: But as this Statute is framed, 'twas argued, that the Bishop might deprive tho' they did not concur, for these Reasons:

1. By the Statutes, the Bishop for the time being, is made the ordinary Visitor of *Exeter Colledge*, and that where any one is Visitor of a Colledge, he hath full and ample Authority to De-

prive or Amove any Member of the Colledge *quatenus* Visitor. 2. There is an expresse Power given to the Bishop to proceed to the Deprivation of the Rector, or the Expulsion of a Scholar; and this in his Visitation. And 3. The qualifying words do not restrain it to be with the Consent of the four Fellows; the word is *Deprivatio* as to the Rector, and *Expulsio* as to the Scholar; tho' they are synonymous as to real Sense, yet by this Statute they are differently applied: Then it says, *If the Bishop do proceed*, &c. that only relates to the Case of a Scholar, because the word there used is *Expulsio*, which is never applied but to the amotion of a Scholar; and it is impossible to relate to the Rector, for then he must consent to his own Deprivation, for his particular Consent is mentioned and required, and that is not to be expected: And in this case, the Consent of the Senior Fellows, without that of the Rector, is not sufficient.

But then the subsequent words are, *That if the Rector be deprived by the Bishop's Commissary, with the Consent of the Senior Fellows, he may appeal to the Bishop*: 'Tis true, the Rector hath that liberty, if the Commissary do deprive him; but there are no words that do abridge the Bishop's own Power. The Commissary's Power is restrained by those words, *To have the Consent*, &c. but the Bishop's own Power hath no such qualification.

It is objected, That 'tis unreasonable to imagine a greater Power in the Visitor, over the Rector, then over the Scholars. But the Question is not, What was fit and reasonable for the Founder to have done? but to consider, upon perusal of the Statutes, what he hath done? Suppose he doth give such an absolute Authority, 'tis what he had over the thing granted; he might have reserved to himself a Power of Revocation, or what other Power he thought fit; and by the same reason he might give the like to a Visitor of his appointment; and having done so, it must be supposed that he had some Reasons for so doing. The Rector hath a Privilege, not to be deprived without the benefit of Appeal, if 'twere by the Commissary: The Scholars have no Appeal. He might think fit to trust the Rector with his Visitor the Bishop, as supposing more care would be taken by him of the Head of the Colledge, then of Inferiour Members.

But the Query is not, What Reason induced the Founder to make those Appointments? He was Master of his own Charity, and might qualifie it as he pleased; and he hath given it under this qualification, That the Bishop is made Visitor, and might deprive the Rector, as he hath done, according to the Statutes and Constitutions of this Colledge.

Then 2. the sufficiency of the Cause of this Deprivation is never to be called in question, nor any Inquiry to be made in *Westminster-hall* into the Reasons or Causes of such Deprivation, if the Sentence be given by him that is the proper Visitor, created so by the Founder, or by the Law.

'Twas

'Twas urged; That there are in Law two sorts of Corporations aggregate, consisting of many Persons; such as are for Publick Government, and such as are for Private Charity. Those that are for Publick Government of a City, Town, Mystery, or the like, being of Publick Concern, are to be governed according to the Laws of the Land, and to be regulated and reformed by the Justice of *Westminster-hall*; of these there are no private Founders, and consequently no particular Visitors: There are no Patrons of these; they only subsist by virtue of the King's Letters Patents, or Custom and Usage, which supposes Letters Patents, and are supported and ruled by the Methods of Law: Therefore, if a Corporation be made for the Publick Government of a Town or City, and there is no Provision in the Charter how the Succession shall be, the Law supplies the Defect of that Constitution, and says it shall be by Election, as Mayor, Aldermen, and Common-Council-men, and the like; and so is *1 Rolls Abridg. 512.*

But private and particular Corporations for Charity, Founded and Endowed by private persons, are subject to the particular Government of those who Erect them: therefore, if there be no visitor appointed; in all such cases of Eleemosynary Corporations, the Law doth appoint the Founder and his Heirs to be Visitors: They are Patrons, and not to be guided by the common known Laws and Rules of the Kingdom; but such Corporations are as to their own Affairs to be governed by the particular Laws and constitutions assigned them by the Founder.

Though some have said, that the Common-Law doth not appoint any Visitation or Visitor at all; yet it is plain, that it doth in defect of a particular appointment; it makes the Founder Visitor; and it is not at his pleasure whether there shall be a Visitor or not, but if he is silent during his Life-time, the right will descend to his Heirs, and so is *2do. & 2do.* where it is admitted on all hands, that the Founder is Patron, and as Patron, is Visitor, if no particular Visitor be assigned, *8. Edw. 7. 8. 8 Affis. 29. 9 Hen. 6. 33. 1 Inst. 96.* so that Patronage and Visitation, are necessary consequents, one upon another; for this Visitatorial Power was not introduced by any Canons or Constitutions Ecclesiastical, it is an appointment of the Law; it ariseth from the property which the Founder had in the Lands assigned to support the Charity: And as he is the Author of the Charity, the Law gives him and his Heirs a Visitatorial Power, *i.e.* an Authority to inspect their Actions, and regulate their Behaviour as he pleaseth: For it is not fit, that the Members who are endowed, and that have the Charity bestowed upon them, should be left to themselves, but they ought to pursue the intent and designs of him that bestowed it upon them.

Where the Poor are not incorporated, *i.e.* they who are to have the Charity, but Trustees are appointed, there is no Visitatorial Power, because the interest of the Revenue is not vested in them; but when they who are to enjoy the benefit of the Gift are incorporated, there to prevent all perverting of the Charity, there

the Law doth not establish a Visitatorial Power; and it being a Creature of the Founders, 'tis reasonable that he and his Heirs should have that Power, unless it were devolved elsewhere.

'Twas further argued, that in our Old Books deprived by Patron, and deprived by Visitor are all one, for this Authority to visit is a benefit that naturally springs out of the Foundation, and it was in his power, if he pleased, to transfer it to another, and where he hath done so, the other will have the same right and Authority as the Founder had.

There's no manner of difference between an Hospital and a College, except only in degree; An Hospital is for those that are poor and mean, or Sick, &c. a College is for another sort of persons, and to another intent, the former is to maintain and support them, this is to Educate them in Learning, that have not otherwise wherewithal to do it: But still it is much within the same reason of that of an Hospital; and if in an Hospital, the Master and Poor are incorporated; 'tis a College having a common Seal to act by, though it bears not that name, because it is of an inferiour degree; and in both cases there must be a Visitor, as both are Elemofinary.

A Visitor being then of necessity created by the Law, (as 8 Edw. 3. 69, 70. Every Hospital is visitable, if lay by the Patron, if Spiritual by the Ordinary,) he is to Judge, and he may Expel; and as it is 8 Affis. 29, 30. he may deprive; the only Query is, if he were Visitor at this time; for it hath been and must be agreed on all hands, that *Quatenus Visitor*, he might deprive; if he be a Visitor as Ordinary, there lieth an Appeal from his deprivation, but if as Patron, there's none; and then that deprivation, whether right or not, must stand.

As to the Objection, that 'tis not the Sentence of a Court, and therefore not Conclusive; 'tis not material whether it be a Court or not, but the Query is, if he had jurisdiction and concurrence of the Person and thing, and if he had, then his sentence holds: and where the Founder hath not thought fit to direct an Appeal, no appeal lies, nay not to the Common-Law Courts: the Founder having put all under the Judgment of the Visitor, it must continue so: He might have ordered it, that the Rector should continue only during the pleasure of the Visitor, but now he hath left it to his wisdom according to the Statutes.

He is a Judge not only in particular by appointment, but as he is Constituted a Visitor in general; then in pleading of a Sentence of deprivation, there is no necessity of shewing the cause, the cause is not traversable even in a Visitation, so is *Rastal. 1. 11 Hen. 7. 27. 7 Rep. Kenne's Case. 9 Edw. 4. 24.*

Suppose this Rectory had been a sole Corporation, and not part of a Corporation aggregate, as it is, Consisting of Rector and Scholars, and Dr. Bury had brought an affize, and this deprivation had been pleaded, it had been good to have said that the *Visitor certis de Causis ipsum adinde moventibus*, had deprived him:

him: every thing that is traversable must be expressed with certainty, but the cause need not be so in this Case.

Now 'tis strange, that pleading a Sentence without a Cause, should be good, and the finding of a Sentence in like manner in a special verdict should not be good: If in Pleading it be not traversable, 'tis the strongest Argument, that the Cause is not to be inquired into; the having no Appeal doth not lessen the validity of the Sentence, it doth only shew the Rector's place, not to be so certain and durable, as in other cases they are, where Appeals are allowed.

The Case of *Candy*, in the High Commission Court, is as strong; a Sentence of deprivation, no Appeals, and the Sentence found and no cause shewn, yet held good: 'tis no Answer to say, that that was by the Ecclesiastical Law, how is it the Ecclesiastical Law, that a Man shall be concluded by one Sentence without Appeal; no, it was, because 'twas by a Court that had *Jur* and the Sentence was not the weaker, or the cause of it more inquirable, because there's no Appeal.

'Twas by the Ecclesiastical Constitution, that the Commissioners had that Power, but that was established by the Law of the Land, and so is the Visiratorial Power, the one Authority is as much derived from the Law as the other.

Bird and *Smith's* Case in *Moore's Rep.* deprivation for not conforming to the Canons; held good in like manner.

As to the Case of *Contney* in *Dyer*, 209. and that in *Baggot's* Case, 11 *Rep.* 99. they are the same as to this matter, though in Two Books, an assize because no Appeal; he quotes Books for it, but upon a petusal they will not warrant the distinction, for the party is as much concluded in the one Case as in the other: 'tis reasonable to suspect that Case not to be Law, because that is impracticable, which it is brought to prove. The Head of a College cannot maintain an Assize for his Office of Headship: He hath not such an Estate as will maintain that writ, therefore to give that instance against us, is hard, the Rector hath no such sole Seizin, the whole body of the College have an interest therein: He hath no Title to the Money in his own Right, till by consent they are distributed, and after such distribution, 'tis not the Rector's Money, but Dr. Bury's; He is the only visible head of the Body in deed, but has no single right.

In *Appleford's* Case, the like Argument was drawn from this Case for a *Mandamus*, and insisted that he might have an assize, but said by the Lord *Hales*, that that was impossible: and in truth, there's no difference between this Case and that of a *Mandamus*, there was a return that he was removed, *pro crimine commisso*, and Appealed to the Bishop of *Winton*, who confirmed the amotion, and the particular cause was not at all returned, and held good, because there was a local Visitor, who had given a Sentence, and all parties were concluded by it, the same being done by the Power of that Government, which the Founder had thought fit to put them under.

Now

Now 'twas argued from hence, That this was an exprefs Case, If the Cause of the Deprivation be examinable in the Courts of Common Law, why not upon a *Mandamus* as well as in an Ejectment. The Lord *Hales* in that Case of *Appleford*, took it for clear Law, That the Sentence was as binding as a Judgment in an Affize: He is made a Judge, and his Person particularly designed by the Founder, but he hath his Authority from the Law; and since the Founder hath trusted the Matter to his Discretion, 'tis not to be suspected that he hath done, or will do otherwise than right.

Then in the next place 'twas argued, That there doth not appear any Injustice in the Sentence, and consequently it ought to be presumed Just; Credence is to be given to a Person that exerciseth Judicial Power, if he keep within his Jurisdiction. The Law hath respect not only to Courts of Record, and Judicial Proceedings in them; but even to all other Proceedings, where the Person that gives his Judgment or Sentence, hath a Judicial Authority; and here's no Fault found in the Sentence; the Jury have not so much as found the Matter and Ground of it to be untrue in Fact, or insufficient in Law.

Then 'twas urg'd, That the Cause of Deprivation here was just, it being for Contumacy. If the Bishop had power to visit in *June*, as he had, and was hindred by their shutting the Doors, whereupon he went away without doing any thing, and came again in *July*, when he held his Visitation, and they behaved themselves Contumaciously, and refused to submit to his Authority; this was *contra officii sui debitum*; 'tis reasonable that both Head and Members should submit to the Visitor; Contumacy is a good Cause of Deprivation, and upon good reason, because it hinders an Inquiry into all other Causes: 'Twas held so in *Bird* and *Smith's* Case, and in *Allen* and *Nash's* Case; *quia fuit refractarius*. Now tho' Contumacy be not one of the Causes mentioned in the Statutes, yet 'twas certainly contrary to their Duty; turning their Backs upon the Visitor, not appearing upon Summons, refusing to be examined, was an Offence, and contrary to what the Statutes require. He is to inspect the state of the Collège, and each Member's particular behaviour; and now when the Visitor comes to make such an Inquisition, and the Head or the Members withdraw themselves, and will not appear to be examined, if this be not a good Cause of Deprivation, nothing can be, for that nothing else can ever be inquired into.

As for that Statute which refers to the Causes for which a Rector may be deprived, it doth not relate to a Deprivation in a Visitation; but shews the manner, how the Collège is to proceed, if he be guilty of such Offences; they may complain at any time to the Visitor, if he waists the Revenues, or behave himself scandalously, and upon request will not resign, and they may Article against him out of a Visitation; but when he comes to execute his Power in his quinquennial Visitation, he is not confined to proceed

ceed only upon the Information of the Fellows, but is to inquire into all the Affairs of the Colledge, and may proceed to deprivation as he sees Cause. Now Contumacy is a *causa* of a Forfeiture of his Office, which is subject to the power of the Visitor by the original Rules of the Foundation; and to evade or contumaciously to refuse or deny a Submission to that Power, is an Offence against the Duty of his Place, and consequently a just Cause of Deprivation; so that upon the whole Matter, 'twas inferred and urged, that the Bishop hath a Visitation Power vested in him to deprive the Rector without consent of the four Senior Fellows. And 2. that the Justice of the Sentence is not examinable in *Westminster-hall*. And 3. that if it were, and the Cause necessary to be shewn, here was a good one, an affronting the very Power of Visiting, and setting up for Independency, contrary to the Will of the Founder; and therefore it was prayed that the Judgment should be reversed.

On the other side, 'twas argued by the Counsel with the Judgment, That this Sentence was void; that 'twas a meer Nullity; that this proceeding had no Authority to warrant it; and that it being done without Authority, 'tis as if done by a meer Stranger; and whether it be such an Act, or not, is examinable at Law; for that the Power of a Visitor must be considered, as a meer Authority or a Trust, and it is one, or rather both, and then either way 'tis examinable; for every Authority or Trust hath, or ought to have, some Foundation to warrant it; and if that Foundation which warrants it, hath limited any Rules or Directions, by which it is to be executed, then those Directions ought to be pursued; and if they are not, 'tis no Execution of the Authority given, or Trust reposed; and if not, 'tis a void Act, a meer Nullity, and consequently 'tis that of which every Man may take notice and advantage.

Then 'twas said, That it must be agreed that of a void thing all Persons may take advantage, and contest it in a Collateral Action, and that altho' it have the form and semblance of a Judicial Proceeding: and for this was cited the Case of the *Marshalsea's*, 10 Rep. 76. as a full Authority; the Resolution was, That when a Court hath no Jurisdiction of a Cause, there all the proceeding is *coram non judice*, and Actions lye against any Person pretending to do an Act by colour of such Precept or Process, without any regard to its being a Precept or Process; and therefore the Rule, *qui jussu judicis aliquid fecerit, non videtur dolo malo fecisse, quia parere necesse est*, will not hold, where there is no *judex*, for 'tis not of necessity to obey him who is not Judge of the Cause; and therefore the Rule on the other side is true, *judicium a non suo judice datum, nullius est momenti*; and so was it held in the Case of *Bowser and Collins*, 22 Edw. 4. 33. per *Pigot*, and 19 Edw. 4. 8. And therefore if the Court of *Common Bench* held Plea of an Appeal of Felony, 'tis all void; but it must be owned, that the meer erroneous procedure of a Court which hath a General Jurisdiction

diction of the Subject Matter is not examinable in a Collateral Action, whether upon true Grounds, or not ; and yet if it be a limited Jurisdiction, and those limits are not observed, even that is *coram non judice* ; and holds with respect to Courts held by Authority of Law, which are much stronger then the Cases of Power created or given by a private Person. A Sheriff is bound by Law to hold his turn within a Month after *Michaelmas*, and he holds it after the Month, and takes a Presentment at that time, if that be removed into the *King's Bench*, the Party shall not answer it, but be discharged, because the Presentment was void, & *coram non judice* ; for that the Sheriff at that time had no Authority ; and yet in that Case his Authority and Jurisdiction extended to the Person and Thing : The same Law for a Leet, unless Custom warrants the contrary, and then that Custom must be pursued.

The Commissioners of Sewers have a limited Authority ; and if the number of Persons, or other Requisites mentioned in their Commission, be not pursued, what they do which exceeds it, is void ; and yet they have a kind of Legislative Authority ; so is it in *Sir Henry Mildmay's Case*, 2 *Cro.* 336. and there they had an Authority both of Thing and Person, but did not observe the Rules prescribed in the Gift of that Authority, according to the 23 *Hen. 8. cap. 5.* and no reason could, or can be given for that Resolution, but that it was a particular limited Authority : And then, to apply this to the present Case, the Sentence in question can no more aggrieve the Defendant, then an Order pronounced or made by a *non Judex*, if it be not agreeable to the Power given by the Statutes ; and this appears further from *Davis's Rep.* 46. where the same Distinction is allowed.

Nay, in some Cases, the Award of a wrong Process is void ; as if by a Steward of a Mannor Court, that a *Capias* should issue, where the same doth not lye, but only an Attachment, *Turville and Tipper's Case*, *Latch.* 223. A Court of Pypowders hath Jurisdiction of an Action of the Case ; yet if it holds Plea of Case for Slander, 'tis all void, tho' the words were spoken within the Boundaries of the Fair, because the Jurisdiction is limited ; so that if the Thing, the Time, the Person, or the Process, be not regarded according to the Authority given, 'tis all void, and an Advantage may be taken of it by any Body, where the Plaintiff Claims or makes his Demand by colour of such Act.

'Twas further argued, That the Reason given in that Case of *Latch*, is, because the Custom which gave him his Authority, gave him notice that such Process did not lye ; and if any Man hath by our Law any Estate, Right, or Priviledge, by any particular means, he is bound to take notice of all the Conditions and Qualifications annexed thereto : And the Reason is just, because the same means, by which he had notice of the Benefit, gives him notice of the restrictive Limitation and Penalty, and so was it held in the Case of *Fry and Porter*.

By our Law no Benefit can accrue to a Man by a Judgment given

ven on a Thing arising *extra potestatem Curie*, in case of a particular and limited Jurisdiction; as in the Case of *Kingston upon Hull*, March 8, which held Plea of Debt upon a Bond made *extra jur'* &c. and a *Jud'*, and *Capias* executed, and an Escape; and no Action lay for the Escape, because all was void, and *coram non Judice*: In the same Book, March. 117, 118. *Dye* and *Olive's* Case, in False Imprisonment, Plea that he was Serjeant at Mace belonging to a Court of Record, and that a Warrant was directed to him to Arrest the Plaintiff *pro quodam Contemptu*, and held not good, because not shewn, in what Action, and how within the Jurisdiction; and if not within it, 'twas *coram non judice*, and void, argued by *Rolls* and *Maynard*.

Then 'twas argued, That this was a limited qualified Power; that the Visitor was a Creature of the Founders; and if it had been the Heir of the Founder, he had been as much bound and restrained by the Statutes, as a Stranger: and tho' the Law should be agreed to be, as is pretended, that it appoints a Visitor, yet still (whether he be the Heir, or Nominee of the Founder) he is an Officer only within the Limits and Rules of the Foundation, and the Statutes made thereupon: As he hath a Visitation Power only over this Colledge, so he hath it only after the manner in which 'tis given to him.

If the Founder had made no particular Visitor, but yet had appointed that the same should be visitable at such a time, and in such a form, he himself had been bound by these Rules; and if he would have been so confined, with much more, or at least with the same Reason, ought his Nominee; for *cujus est dare, ejus est disponere*; and every Argument which hath been urged for the Rector's being subject to the Rules of the Foundation, may likewise be applied to that of the Visitor: He that made the Visitor, may restrain, shape, and modify the Power which he gives him: He might have made him Visitor only once in his Life, or only upon Request, and have left all other Jurisdiction to the Rector and Fellows.

But further, here he is found to be Visitor only *secundum formam statuti* & *vigore statuti*, and to execute those Statutes; and that which makes him a Visitor, makes him such thus and thus qualified, and no otherwise: whatsoever Power or Authority the Name or Office of a Visitor may import *ex vi termini*, no Man can say but this Visitor is controuled by the Statutes, which make him so: now had there been no Statutes, he had never been Visitor; then these Statutes making him a Visitor, upon particular Terms and Conditions, Times and Occasions; *extra* these Terms and Conditions he is no Visitor at all; this seems plain and natural: So that if he exceeds the Bounds prescribed to him as Visitor, he doth not act as Visitor; for all Powers, Authorities, and Jurisdictions, especially such as are created by private Persons, must be executed according to the express Institution, or plain meaning of the Party that created them, and according to the Circumstances, with which he hath circumscrib'd them: So is the Rule

in *Berwick's Case*, 5 *Rep.* 94. and 1 *Inst.* 113. and 258. An Executor is an Officer or Person intrusted, which is taken notice of by the Law, yet in his Creation he may be limited *quoad* the Estate in one Country, or *quoad* one Particular, and he can't intermeddle any further; but Administration shall be granted as to the rest.

Then 'tis observable, That this Statute Visitor is not a Court of Record, nor any Court at all, but rather like an Arbitrator under certain Directions, he can neither meddle at another Time, or with other Matters, or in other Manner, then what is prescribed. But admitting it a sort of Judicature, here's no Appeal or Writ of Error, or Prohibition or *Mandamus* lies; nay, the Visitor himself cannot relieve against his own Sentence, or restore the Party deprived the next day; but the Place being vacant, a right of Election accrues to the Fellows; 'tis therefore unreasonable to suppose him not restrained, or that his Acts, if exceeding the Limits and Rules set him, shall be conclusive and binding.

This is like a Lay-Hospital, 'tis not a Religious Body, tho' some call it mixt; and in case of Temporal Lay Offices, there must be some Remedy at Law, as is 13 *Rep.* 70. so is *Dyer* 209. and 3 *Inst.* 340. Where no Appeal is allowed, another Examination must be admitted; and thus seems the 8 *Affis. pl.* 29. tho' it hath been quoted on the other side; If the Warden of an Hospital be irregularly deprived, he shall have his Remedy at Law; and 13 *Affis.* 2. to the same effect: *Bagges's Case*, 11 *Rep.* repeats the same Case, which shews *Coke's* Opinion to concur with it; and tho' an Affize doth not properly lye, yet the meaning is, he shall have Relief, *i. e.* such Suit at Law as is proper to his Case: The same Distinction is allowed in *Dr. Sutton's Case*, *Latch.* 279. And that a Remedy is given by the Law in this Case of a Temporal Property, seems to be plainly affirmed in the Statute of 24 *Hen.* 8. cap. 12. And further, Tho' strictly and properly it were not of Common Law connusance, yet it falling incidently to be a Question upon trial of a Title, the Court before whom that Suit depends, must examine that incident, as in case of an Issue, lawfully joyned in Marriage or not, the Trial shall be by Certificate of the Ordinary; but if it be a Question upon the Trial of a Title to Land, the Matter shall be tried and judged without Certificate.

The wisdom of our Law hath been such, as very rarely to trust any of the Courts of Justice with the final determination of matters of Law in the first Instance; and 'twould be strange that this Case of a Visitor should stand single by it self. Besides to prevent a failure of Justice, the Law doth of necessity admit of several other provisions and methods of Examination or Tryal, than what the subject matter or person would properly in their own nature require, especially in point of remedy and relief, as appears in *Dormer's Case*, 5 *Rep.* 40. and 1 *Inst.* 54. 2 *Roll's Abridg.* 587. now here is no other remedy, nor other way of trial,

for Deprivation is not triable by Certificate, but only in case of an Ecclesiastical person.

As to the Objection from *Appleford's Case*, *Sid. 71.* there that Writ was fully answered, and they could not Examine into the truth and falsity of that Answer, but must leave the party to his Action; and it doth not thence follow, That in an Action, there's no remedy: But the strongest Objection is, that in pleading a Deprivation, you need not shew the Cause, and it must be taken for just and good, as *Moore 781. Jones 393. Moore 228. 2 Roll's Abridg. 219. 9 Edw. 4. 25.* that need only shew by whom: All these stand upon the same foundation, they were by Authority Ecclesiastical, and must stand till Repealed; and even those Cases of the High Commission Court, they were by the course of the Ecclesiastical Law, which was saved to them by the Proviso, in *1 Eliz.* and therefore shall be intended so, till the contrary appear: and even there 'twas, *debito modo privatus*, which implies, all due requisites; but here the whole is disclosed, upon a special Verdict; 'tis not found here, that he was duly deprived; but that he was deprived after such a manner, which if it appears to have been without Authority, must be null: As to *Ley's Opinion* in *Davis 47.* that a Sentence of Deprivation in case of a Donative by an Ordinary, was effectual in Law, till Reversed; that's not Law, for 'twas all *coram non iudice. Bro. Præmunire 21. Nat. Br. 42.* the Ordinary cannot visit a Benefice Donative.

Then they Object, That this is an Eleemosynary interest, and the Rector took it under those terms of subjection to such a Visitor, but that is the Question, what those terms are, and the consequences of such an Opinion may be dangerous to the Universities, those Nurseries of Learning, and good Manners, 'tis to make them too precarious and dependent upon will.

And as to the pretence that the Land was the Founders, and he might dispose of it at pleasure, it was answered, that before the Gift, the Lands and the Profits and the Ownership were all subject to the Common-Law, and the Owner could not give such a Power as is pretended, no more than he could oblige all differences about his Estate to be finally determined by a particular person, and his Heirs or Successors: no Absolute Power can be fixed in this Nation by Custom, but rather then the same shall be allowed, the Custom shall be void; *1 Inst. 14. Davis 32. 2 Roll's Abridg. 265.* Copyholds were Anciently at mere will and pleasure, but the Lord is now obliged to, and by certain Rules: by our Law the Power of Parents over Children is qualified and restrained; 'tis no Argument, to say that the Visitor comes in *loco* or *vice fundatoris*, for the Alienation and the Statutes did oblige even himself: and though perhaps if no Statutes had been made, his Visitorial Power had been much larger, yet since 'tis limited to once in five Years, and his Acts to be with others consent, 'tis as much as if he had given the Colledge a privilege of exemption by Words Express, from any Visitation, at all other times, and in all other manners, than those which are mentioned: then was

Cited

Cited the Case of *Terry and Huntington*, in *Scaccar' Trin. 20 Car. II.* in *Hardres's Rep.* 480. before Sir *Matthew Hale*, Trover for Goods, seized by Warrant of the Commissioners of Excise, the Query was, when they adjudged low Wines to be strong Wines perfectly made, upon 12 *Car. II. cap. 23.* whether it might be drawn in Question again by an Action in *Westminster-Hall*, and held it might, though they were Judges, and though the Statute gave an Appeal; and the reasons given there seem to reach this Case, because they had a stinted limited Jurisdiction, and that implies a Negative, *viz.* that they shall not proceed at all in any other Cases; and that special Jurisdictions might be and frequently were circumscribed, 1. with respect to place, as a Leet or a Corporation Court; 2. with respect to persons, as in the Case of the *Marshalsea*; 3. with respect to the subject matter of their Jurisdiction: And if Judgment be given in another place, or upon other persons, or about other matters, that all was void and *coram non iudice*; and though 'twas objected, that strong Wines were within their Jurisdiction, and that 'twas only a mistake in their Judgment; yet it appearing upon the special Verdict, that they were low Wines, the Action was held maintainable; this is so plain, it needs no Application.

Then it was argued, that this Sentence was void, 1. because there was no Authority to visit at this time, there having been a Visitation by the Commissary within five Years before; that no words in the Statute make him a Visitor generally, but only *secund' stat'* i.e. upon request, or without request, *a quinquennio in quinquennium, Semel.* now here's no request found; then the Act of *Dr. Masters* as Commissary is an exercise of the Visitor's Office; *Colmer's* Appeal was to the Bishop as Visitor; *Semel.* implies a negation of having it more frequent: according to Grammar, it signifies once and not oftener or, once for all: If *Semel* comes alone, without any other Particle, then 'tis but once, and if with another, as *me Semel*, 'tis not once, or never: and the *liceat Semel* can have no other Construction; it can't mean once at the least, as was argued below, especially as opposed to request: and no Argument can be drawn from the necessity of frequent Visitations, for that Evils are not to be presumed; and over inferior Members, there's a Power in the Rector and four Seniors: now *Dr. Masters* was not requested by the Colledge, nay, they protest against it in some Degree, *Y. e.* so far as relates to *Colmer's* restitution; the Oath of a Scholar being against Appeals: and the Oaths and the Contents of them are to be deemed part of their Constitution; But supposing that Business might be examined as a thing proper for Consideration, when an inquiry is made into the State of the College; and the admission, continuance, and removal of the Members is certainly one Article of such inquiry, yet that must be done in Visitation, and as Visitor, for there's no other Power found in the Verdict but that.

2. Admitting that no Action of Dr. Masters to be Visitation, yet this Sentence is void, because it held above three days, and the Statutes say, after three days it shall be taken *pro terminat & dissolut*. On the 6. of June he comes with intention to visit, doth an Act proper to his Office and Business, examines the Summoner about the Citation; if he had come and only examined and made no Decree, it had been a Visitation; and either 'tis a *quinquennial* one of it self, or it is a Commencement of one, and either one way or other, it makes the Deprivation void: 'tis afterwards entred as a Visitatorial Act; *Eundem actum pro parte hujusmodi negotii Visitationis haberi decrevit*, and then he adjourns; 'tis no Argument to say that he was hindred, for he might have proceeded *in absentia*; and if the 16th of June be tacked to it, 'tis longer than the time: There needed no formal adjournment, for that he is Authorized to proceed in a Summary way; 'tis no such absurdity to call that a Visitation which was in some sort hindred, since notwithstanding the obstruction some Acts were done, and more might have been by adjourning to another place.

3. Here was no such cause as could warrant a Deprivation, it was not one of the causes mentioned in the Statutes, which are not directions merely, but they are the constituent Qualifications of the Power; and Contumacy is none of the causes, nay, here is no Contumacy at all: The Offence of the Suspended Fellows, was only a mistake in their Opinions, and the Doctors was no more; and 'tis not a Contumacy for refusing to answer to, or for any Crime within the Statutes, for there was none of the Crimes mentioned in the Statutes laid to the charge of the Rector; if the Crime charged had incurred Deprivation, perhaps a Contumacy might be Evidence of a Guilt of that Crime, and so deserve the same Censure; but Contumacy in not consenting to a Visitation can never be such, especially when the consenting to a Visitation is not required under pain of Deprivation.

4. Admitting the Visitor legally in the Exercise of his Office, that here was cause of Censure; that the Cause or Crime was deserving of that Punishment which was inflicted; that Deprivation was a congruous Penalty for such an Offence: yet twas argued, That this Sentence was void; for that the Visitor alone was in this Case *minus competens judex*, because his Authority was particularly designed to be exercised with the consent of others, which was wanting in this Case: This was the same as if it had required the concurrence of some other Persons *Extra Colleg* then that such a concurrence was necessary, appears from the words of the Statute, his meaning seems plain upon the whole, to require it. A greater tenderness is all along shewn to the Rector, then to the Scholars, 'tis *sine quorum consensu irrita erit hujusmodi Expulso & vacua ipso facto*: and the Sentence it self shews it necessary, because it affirms it self to be made with such consent; and it cannot be thought that the Rector should be deprivable without their consent, when the meanest Scholar could not.

Then

Then here's no such consent, for 'tis not of the four Seniors, but of the four Seniors not Suspended; now this doth not fulfil the Command of the Statute, for the Suspension doth not make them to be no Fellows, a Suspended Fellow is a Fellow though Suspended; a Suspension makes no vacancy; the taking off of the Suspension by Sentence or by Effluxion of time, doth make them capable of acting still, without the aid of any new Election, and they are in upon their old choice, and have all the privileges of Seniority and Precedency as before.

If they ceased to be Fellows by the Suspension, then they ought to undergo the *Annus probationis* again, and to take the Oaths again: In case of Benefices or Offices, Religious or Civil, Ecclesiastical or Temporal, 'tis so; a Suspension in this Case is only a disabling them from taking the Profits during the time it continues: And 'tis no Argument to say, That their Concurrence was not necessary, for that they had withdrawn themselves, and were guilty of Contumacy; for that a Man guilty of Contumacy might be present, if withdrawn from the Chapel, he might be in the Colledge, or in the University, and 'tis not found that they were absent: and then their Consent not being had, the Sentence was void and null, and consequently no Title found for the Lessor of the Plaintiff in the Action below.

It was replied in behalf of the Plaintiff, much to the same effect as 'twas argued before, and great weight laid upon the Contumacy, which hindered the observance of the Statutes; that by allowing such a Behaviour in a Colledge, no Will of the Founder could be fulfilled, no Visitation could ever be had; and all the Statutes would be repealed or made void at once; that tho' this Crime was not mentioned, 'twas as great, or greater than any of the rest; that here was an Authority, and well executed, and upon a just Cause, and in a regular manner, as far as the Rector's own Misbehaviour did not prevent it; and therefore they prayed that the Judgment might be reversed. And upon Debate the same was reversed accordingly.

Note, That in this Case there was one Doubt conceived before, and another after this hearing: The first was, If a Writ of Error lay in Parliament immediately upon a Judgment in the *King's Bench*, without first resorting to the *Exchequer Chamber*; but upon perusing the Statute which erects that Court for Examination of Errors, it appeared plainly that that Act only gives the Election to the Party aggrieved to go thither; that it did not take away the old Common Law method of Relief in Parliament, and so hath the Practice been; but upon Judgments in the *Exchequer Court*, the Writ of Error must first be brought before the Lord Chancellor, and cannot come *per saltum* into Parliament, because the Statute in that case expressly ordains, That Errors in the Court of *Exchequer* shall be examined there; and so held in the Case of the

the Earl of *Macclesfield* and *Grosvenor*.

The other Doubt was raised by a Motion in *B. R.* for the Court to give a new Judgment upon the Reversal above; and insisted on, that it ought so to be, as was done in the Case of *Faldo and Ridge*, *Telv.* 74. entred *Trin.* 2 *Jac.* 1. *Rot.* 267. *Trespas* and Special Plea, and Judgment in *B. R.* for the Defendant; and upon Writ of Error in the *Exchequer Chamber*, the Judgment was Reversed; and upon the Record returned into the *King's Bench*, they gave Judgment that the Plaintiff should recover contrary to the first Judgment: for otherwise they said, the Law would prove defective; and a Precedent was shewn in *Winchcomb's Case*, 38 *Elix.* where the same Course was taken; and the like Rule was made *Mich.* 1 *W. & Mar.* upon the Reversal of the Judgment *inter Claxton vers. Swift*, which is entred *Mich.* 2 *Jac.* 2. *B. R. Rot.* 645. the like between *Sarsfield vers. Witherley*.

It was argued on the other side, That the Court which reverses the Judgment ought to give the new Judgment, such as ought to have been given at first, that in the *Exchequer Chamber* it may be otherwise, because they have only power to affirm or reverse; for yet in the Case of *King and Sentin*, the *Exchequer Chamber* gave a new Judgment, tho' they cannot inquire of Damages: and that is a kind of Execution which must be in *B. R.* In *Omulker's Case*, 1 *Cro.* 512. and 2 *Cro.* 534. the Court here sends a Mandatory Writ to command them in *Ireland* to do Execution there, *St. John vers. Cummin*, *Telv.* 118, 119. 4 *Inst.* 72. If Writ be abated in *C. B.* and Error brought in *B. R.* and the Judgment be reversed, shall proceed in *B. R.* and 1 *Rolls* 774. to the same effect, *Green vers. Cole.* 2 *Saund.* 256. The Judges Commissioners gave the new Judgment. 'Tis true, in *Dyer* 343. the opinion was that he was only restored to his Action, and then Writs of Error were not so frequent. The Judgment may be erroneous for the Defendant, and yet no reason to give a Judgment for the Plaintiff, as in *Slocumb's Case*, 1 *Cro.* 442. the Court gave a new Judgment for the Defendant; therefore it properly belongs to the Court, which doth examine the Error, to give the new Judgment; the Record is removed, as *Fitzh. Nat. Brev.* 18, 19. on false Judgment in ancient Demesne; v. 38 *Hen.* 6. 30. and *Griffin's Case* in Error on a *quod ei deforceat*, in 2 *Saunders* 29, 30. new Judgment given here. In the Case of *Robinson and Wolley* in 3 *Keeble* 821. Ejectment, Special Verdict, Judgment reversed in the *Exchequer Chamber*; and they could never get Judgment here, the Court of *Exchequer Chamber* not having given it: and in the principal Case, after several Motions in the Court of *King's Bench*, the *Remittitur* not being entred there, a Motion was made in Parliament upon this Matter, and a new Judgment was added to the Reversal, that the Plaintiff should recover, &c.

Dr. William Oldis Plaintiff,

Versus

Charles Donmille Defendant.

WRit of Error to Reverse a Judgment in the Court of Exchequer, affirmed upon a Writ of Error before the Lord Chancellor, &c. The Case upon the Record was thus; Donmille declares in the Exchequer in *placito transgr' & contempt'*, &c. for a Prosecution *contra regiam prohibiti'*, and sets forth *Magna Charta* that *nullus liber homo*, &c. that the Plaintiff is a Freeman of this Kingdom, and ought to enjoy the free Customs thereof, &c. that the Defendant not being ignorant of the Premises, but designing to vex and aggrieve the Plaintiff, did in *Curia militari Henrici Ducis Norfolk' coram ipso Henrico Com' Mareschal'* Exhibit certain Articles against the Plaintiff, &c. that Sir Henry St. George Clarenceux King at Arms, was, and is King at Arms for the Southern, Eastern, and Western Parts of the Kingdom, viz. from the River of Trent *versus Austrum*, and that the Conuance, Correction, and Disposition of Arms, and Coats of Arms, and ordering of Funeral Pumps time out of mind, did belong to him within that Province; and that the Plaintiff having notice thereof, did, without any Licence in that behalf had and obtained, paint, and cause to be painted, Arms and Escutcheons, and caused them to be fixed to Herfes, that he provided and lent Velvet Palls for Funerals; that he painted divers Arms for one Berkstead, who had no right to their use at the Funeral, and did lend a Pall for that Funeral, and paint Arms for Elizabeth Godfrey, and marshalled the Funeral, and the like for Sprignall: and that he had publicly hanging out at his Balcony Escutcheons painted, and Coaches and Herfes, and other Publick Processions of Funerals, to entice People to come to his House and Shop for Arms, &c. That the Defendant compelled the Plaintiff to appear and answer the Premises, &c.

The Defendant *in propria persona sua venit & dicit*, That the Court of the Constable and Marshal of England is an ancient Court, time out of mind, and accustomed to be held before the Constable of England, and the Earl Marshal of England for the time being, or before the Constable only when the Office of Earl Marshal is vacant; or before the Earl Marshal only when the Office of Constable is vacant; which Court hath, time out of mind, had Conuance of all Pleas and Causes concerning Arms, Escutcheons, Genealogies, and Funerals within this Realm, and that no other Person hath ever intermeddled in those Pleas or Affairs, nor had or claimed Jurisdiction thereof; and that the Suit complained of by the Plaintiff was prosecuted in the said ancient Court of and for Causes concerning Arms, Escutcheons, and Funerals: That by the 13 Rich. 2. 'twas enacted, that if any Person should complain of any Plea begun before the Constable and Marshal, which might be tried by the Common Law, he should have a Privy

Seal

Seal without difficulty to be directed to the Constable and Marshal to Supersede that Plea, till discussed by the King's Counsel, if it belongs to that Court or to the Common Law, *prout per Statut' ill' apparet*, and that the said Court, time out of mind, hath been *tant' honoris & celsitudinis*, that it was never prohibited from holding any Pleas in the same Court *aliter vel alio modo quam juxta formam Statut' præd'* Et hoc parat' est verificare unde non intendit quod Curia hic placitum præd' ulterius cognoscere velit aut debeat, &c.

The Plaintiff demurs, and the Defendant joyns.

From the *Exchequer Court* this was adjourned *propter difficultatem* into the *Exchequer Chamber*, and afterwards by advice of the Judges there, the Court gave Judgment for the Plaintiff, which was affirmed by the Chancellor and Treasurer, &c.

And now it was argued on the behalf of the Plaintiff in the Writ of Error, that this Judgment was erroneous, and fit to be reversed.

And first to maintain the Court as set forth, 'twas insisted on
1. That when there was a Constable and Marshal, the Marshal had equal Power of Judicature with the Constable, as each Judge hath in other Courts. 2. That the Constable had in that Court power of Judicature alone, when there was no Marshal. And 3. That the Marshal had the like, when there was no Constable.

That they had both equal power of Judicature, appeared by all their Proceedings; by their Libels or Bills, in the Case of *John Keightley Esq.* against *Stephen Scroop*: The Libel is, *In the Name of God, Amen. Before you my Lords the Constable and Marshal of England in your Court of Chivalry, and prays that the said Stephen, by their Sentence definitive, may be punished, 1 pars Pat. 2 Hen. 4. m. 7.* And the same *Stephen* libelled against *Keightley* to the thrice Honourable Lords the Constable and Marshal of England. So the Libels were directed to both, and both satè judicially.

The same appears by the Sentence or Judgment given in that Court: *Bulmer* libelled against *Bertram Usan coram Constabulario & Mareschallo, qui duellum inter partes allocaverunt & assignaverunt locum & tempus, Rot. Vascor' 9 H. 4. m. 14.* It doth likewise appear to be so by the Appeals from their Judgments to the King; they are both sent to, to return the Rolls of their Judgments, *Rot. Claus. 20 Edm. 1. m. 4.* In the Appeal brought by *Sir Robert Grovesnor* against *Richard Scroop*, 'tis upon the Sentence given by the Constable and Marshal in the Suit before them concerning a Coat of Arms, *Rot. Claus. 12 Rich. 2. m. 4.* Appeal by *Bond vers. Singleton*, 'tis in a Cause of Arms in our Court before our Constable and Marshal, wherein Sentence was given by them, *1 pars Pat. 17 Rich. 2. m. 12.* Thus it appears by a Commission for the Execution of the Office of Constable of England, *Committimus vobis officium hujusmodi Constabularii ad querelam Thome Moor in hac parte una cum Edmundo de Mortimore Mareschallo Anglie audiendum; secunda pars Patent' 48 Edm. 3. m. 20. in dorso.* As also by a Claim at

the Coronation of H. 5. before *Beauchamp* Earl of *Warwick* then Lord Steward. *John Mowbray* Earl Marshal, Son to the then Duke of *Norfolk*, claimed under a Grant in 20th. of *Rich. 2.* of the Office of Earl Marshal of *England*, to hold Court with the Constable, and to hold Pleas before them; and Copies of these Precedents were said to have been ready in Court.

Further, to prove the joynt Authority, were cited several of our Old Books, 48 *Edw. 3.* fol. 3. in a Case of Debt upon an Indenture by which P. was retained by the Defendant, with two Squires of Arms for the War in *France*: *Belknap* said, of such Matter this Court cannot have consueance, but 'tis triable before the Constable and Marshal. In the Case of *Pountney* and *Bourney* 13 *Hen. 4.* 4. the Court of *King's Bench* call it the Court of the Constable and Marshal: And in 37 *Hen. 6.* 3. upon another occasion, *Prisot* said, this Matter belongs to the Constable and Marshal: And *Coke* 4 *Inst.* 123. says that they are both Judges of the Court: and that the Constable sometimes gave Sentence, is no Argument that the Marshal was no Judge with him; it only proves him the Chief, who in most Courts doth usually give the Rule: Nor is the Earl Marshal's receiving Writs from the Constable to execute his Commands, any Argument that he sits there only as a Ministerial Officer, and not as a Judge; for he may be both; as in many Corporations, Mayors are Judges of the Court, and yet have the Custody of their Goals too, and so have the Sheriffs of *London* their Compters; tho' they strictly are Judges of their several Courts.

2. During the Vacancy of the Earl Marshal's Office, the Constable alone had the Judicature; as in 11 *Hen. 7.* on *Holyrood-day*, the Earl of *Durby* being then Constable of *England*, sat and gave Judgment alone in a Cause between *Sir Thomas Ashton* and *Sir Piers Leigh* upon a Coat of Arms: but this needs no Proof, since 'tis contended on the other side, that the Court doth belong only to the Constable.

3. 'Twas argued, that the Earl Marshal hath set alone and given Judgment, and to prove that, it was said, this Court was held when there was no Constable, before *Thomas Howard*, Duke of *Norfolk*, Lord High Treasurer and Earl Marshal of *England*, who Died 16 *Hen. VIII.* and next after him, before *Charles Brandon*, Duke of *Suffolk*, then Earl Marshal, who Died 37 *Hen. VIII.* after him, the Court was held and Sentences given by *Thomas Howard*, Duke of *Norfolk*, who Died in 1512. and after him, in the 30 *Eliz.* the Earl of *Essex* sat as Earl Marshal, and heard and determined Causes judicially, and the chief Judge sat then as Assistant with him in Court, and then after the Death of the Earl of *Essex*, it was in Commission to my Lord Treasurer *Burleigh*, and others, and then the great Case of *Sir F. Mitchell*, was heard and determined, at which, several Judges assisted, and the Sentence of Degradation was executed upon him, 26. April, 1621. and

and then was Cited the Case of *Pool and Redhead* 12 Jac. 1. 1 *Roll's Rep.* 87. where 'twas held, that the proper remedy for Fees of Knighthood was to sue to the Earl Marshal; and *Coke* says in the same Case, the Common-Law does not give remedy for precedency, but it belongs to the Earl Marshal: And since that in *Parker's Case*, which was 20 Car. II. *Syd.* 353. the Earl Marshal was agreed to have the absolute determination of matters of Honour in the Court of Chivalry, as much as the Chancellor hath in matters of Equity: And the Error on the other side, was occasioned by not distinguishing between the Ancient Jurisdiction of this great Court at the Common-Law, and the Jurisdiction given to the Constable and Marshal under those names by Statute: for the latter cannot be executed by one alone; and that distinction answers the Authority in 1 *Inst.* 74. which grounded the mistake, that there is no Court of Chivalry, because there's no Constable, whereas, the reason why in *Sir Francis Drake's Case*, the not constituting of a Constable silenced the Appeal, was from the 1 Hen. IV. Cap. 14. which orders all Appeals of Murder committed beyond Sea to be before the Constable and Marshal by name: But the Ancient Jurisdiction of this Court by prescription, wherein both the Constable and Marshal were Judges severally or together, and which each of them did and could hold alone, remains still as much in the Earl Marshal alone, as it ever was in him and the Constable.

Then it was argued that no Prohibition lay to this Court, because none had ever been granted, and yet greater occasions then now can be pretended, by reason of the large Jurisdiction, which this Court did in Ancient time exercise: many Petitions were frequently preferred in Parliament, Complaining of the Incroachments of this Court in *Edw. I. Edw. III. Rich. II. Hen. IV.* and *Hen. VIth's* time, as appears in 4 *Inst.* 125. 2 *Hen. IV.* num. 79. and 99. 1 *Roll's Abridg.* 527. and yet no Prohibition granted or moved for; which, according to *Littleton's Text* is a very strong Argument, that it doth not lie.

The Statute of 13 *Rich. II.* 2. is an Argument against it, because after several Complaints of the Incroachments of this Court, another remedy is given, which had been needless, if this had been legal: nay, it shews the Opinion of the Parliament, that there was no other way of relief: and soon after the making of this Statute, in the same Reign two Privy Seals were sued upon it: in the Case of *Poultney and Bourney*, 13 *Hen. IV.* 4. 5.

Besides, this might be grounded on the Antiquity and greatness of this Court: for as to the subject matter of it, 'tis by Prescription a Court for determining matters of Honour, to preserve the distinction of degrees and quality, of which no other Courts have Jurisdiction; and the right and property in Honours and Arms is as necessary to be preserved in a Civil Government, as that in Lands or Goods. Then 'twas urged that this Court hath Jurisdiction even of Capital Offences, its extent is large, 'tis throughout the Realm, even in Counties Palatine, even beyond the

the Seas; its manner of proceeding is different, in a Summary way by Petition, its trial of Fact may be by Duel as is 4 *Inst.* 125. though the Statutes of *Hen. VIII.* impower Commissions for trial of Treasons Committed beyond the Seas, yet this Court doth and may still take Conusance of such Causes, 4 *Inst.* 124. Its Sentences are only reverfable by and upon Appeal to the King, no Writ of Error or false Judgment lies upon any of them, which shews the greatness of the Court, and the difference of its Jurisdiction from other Courts; which may be some of thereasons, why no Prohibition was ever granted to it, and why the Parliament of *Rich. II.* gave the Remedy of a Privy Seal: wherefore it was prayed that the Judgment should be Reverfed.

On the other side, it was argued by the Council, in behalf of the Plaintiff in the Original Action, that this Judgment ought to be affirmed, and it was after this manner, there seem three Queries in the Case; 1. If any Prohibition lies to that Court; 2. If any Cause here for a Prohibition; and, 3. If there be any such Court as that before the Earl Marshal; but another doubt was raised, whether any of these Questions could be such upon this plea, which is concluded to the Jurisdiction; for that seems to make only one doubt, whether the Court of Exchequer could hold Plea of an Action for proceeding contrary to a Prohibition already granted; but this was waved, and then it was argued,

1. That a Prohibition doth lie to this Court of Chivalry, in case it exceeds the Jurisdiction proper to it; and it was agreed, that the Office of Constable is Ancient, and by *Cambden* is held to have been in Ure in this Kingdom, in the *Saxon's* time, though the Office of Marshal is but of a *puisne date*: but however Great and Noble the Office is; however large and Extensive the Jurisdiction is, yet 'tis but limited, and *Coke* in 4 *Inst.* 123. says that 'tis declared so, by the Statute of *Rich. II.* where 'tis said, that they incroached in great prejudice of the King's Courts, and to the great grievance and oppression of his people, and that their proper Business is to have conusance of Contracts and Deeds of Arms, and of War out of the Realm, which cannot be determined or discussed by the Common-Law, which other Constables have heretofore duly and reasonably used in their time; now by this Act 'tis plain, what the Jurisdiction is: Contracts and Deeds of Arms, and War out of the Realm, are the subject matter of it; and by *Coke* 'tis called, *curia militaris*, or the Fountain of Marshal Law: which shews it a Court, that hath its boundaries, a Court that may incroach, nay, which hath incroach'd in diverse instances belonging to the Common-Law: And that 'tis a Court that ought to meddle with nothing that may be Determined in *Westminster-Hall*: then there must be some way of restraining this excess and these incroachments, and if the Statute of *Rich. II.* had not been made, it must be agreed that a Prohibition would have lain, for else there had been no remedy, which is absurd to affirm.

'Tis

'Tis no Objection that Prohibitions are only grantable to Inferiour Courts, and that this is one of the greatest Courts in the Realm, for if a Court Marshal intermeddle with a Common-Law matter, *ea ratione*, it becomes inferior and may be contrawled: There needs no contest about the Superiority of Courts in this matter, 'tis the same here, as among private Persons, he that offends becomes inferior, and subject to the Censure of his equal by offending; though that Court should be reckoned so noble and great as, hath been represented, yet 'tis only so, while it keeps within its Jurisdiction; Prohibitions are grantable to almost all sort of Courts, which differ from the Common-Law in their proceeding, to Courts Christian, to the Admiralty, nay, to the Delegates, and even to the Steward and Marshal, upon the Statute of *Articuli super Chartas*, Cap. 3. That they shall not hold Plea of Freehold or of Trespass, *Fitz. N. B.* 241, 242. is an expresse Writ of Prohibition, though the Statute gave no such Writ, but only did restrain the Jurisdiction of the Court; which in truth, is the Case in Question, antecedent to the Statute pleaded.

No Argument can be raised from the subject matter of the Jurisdiction of this Court, that 'tis different from the Common-Law, for so is the Admiralty and the Prerogative Courts, nor is it any Objection that upon any Grievance in this Court, the Appeal must be to the King, for that holds in the other Courts with equal reason: Nay, Prohibitions lie from *Westminster-Hall*, to hinder proceeding in Causes, which the Courts that grant such Prohibitions, cannot hold Plea of; as to the Ecclesiastical Court which grants probate of a Will made within a Mannor, to the Lord whereof such probate belongs, *5 Rep.* 73. to the Marches of *Wales*, if hold Plea of what belongs to Court Christian, *2 Roll's Abridg.* 313. are several Cases to this purpose: there were also Cited, *1 Roll's Rep.* 42. *2 Roll's Abridg.* 317. *Sid.* 189. *1 Brownl.* 143, 144. and *Herne* 543. 'twas further urged, that there neither was nor could be any reason assigned, why a Prohibition should not be grantable to the Court of Chancery, when by *English Bill* it meddles with the Common-Law, in other manner than its Ancient and proper Jurisdiction doth allow, and several Authorities were Cited to countenance that Assertion.

Then was considered the reason of Prohibitions in general, that they were to preserve the right of the King's Crown and Courts, and the ease and quiet of the Subject, that 'twas the Wisdom and Policy of the Law, to suppose both best preserved, when every thing runs in its right Channel, according to the Original Jurisdiction of every Court, that by the same reason one Court might be allowed to incroach, another might, which could produce nothing but confusion and disorder in the Administration of Justice; that in all other Writs of Prohibition, the suggestion is and with Truth, *in prejudicium corone Regis & Gravamen partis*, and both these are declared to be the consequent of this Courts excess or incroachment of Jurisdiction, even by their own Statutes: and, when the reason is the same, the remedy ought to be so:

But,

But, it hath been pretended, That the Statute appoints a Privy Seal for to supersede, &c. and therefore no Prohibition; to this it was answered, That this Act doth not take away the force of the 8 *Rich. II.* mentioned in 4 *Inst.* 125. which restrains the Constable and Marshal from meddling with any Plea, which concerns the Common Law, and if it had a limited Jurisdiction by the Common-Law, or by that Statute, the subsequent Statute which gave a further Remedy for to restrain them, did not take away that which they had before; and every Body must agree, that where an Act of Parliament restrains a Jurisdiction, such Act warrants a Prohibition, in case that restraint be broken or exceeded; 'tis so in case of a limited Power at the Common Law, but much more so upon a Statute.

Besides, the latter Statute which gives a Privy Seal, doth not Repeal or alter the Law then in being, 'tis an Affirmative Law, and that seldom or never works any change or alteration in what was before, any otherwise then by Addition or Confirmation; and in truth this is only a further remedy, and is far from declaring a Prohibition not to lie: the meaning might be to give a Privy Seal immediately, even in vacation time; the preamble complains so much of the Grievances, that it cannot be supposed to Design any thing in favour of them, or to prevent the restraint.

Suppose between the 8 and the 15 *Rich. II.* an excess of Jurisdiction had been usurped as in this Case, will any Man say, that a Prohibition would not then have lain; and if it would, can any Man say, that the Statute pleaded, doth take it away, or Prohibit such Writ of Prohibition: And the 11 *Hen. IV.* 24. ordains that all the Statutes concerning the Court of Constable and Marshal, shall be duly observed; and if so, the 8 *Rich. II.* as well as the 15 *Rich. II.* are within that ordinance; and if so, a Prohibition lies as well as a Privy Seal; and both are little enough to keep that Court within its due bounds and limits.

2. It was argued, That the proceeding upon these Articles, was an intermeddling with a subject matter properly determinable at Common-Law; here's no contract or deed of Arms, no Mis-behaviour in War, nothing of that nature, which their own Statute says belongs to them: *Rushworth's II.* Vol. 1054. he frequented the Court for four years together, he observed no Cases there but for Words, and one or two as *Delaware's Case*, about abusing an Honourable Family, by assuming to be a branch thereof; here's no such thing, but express Articles for exercising of a lawful Trade; 'tis not *causa armorum*, it doth neither concern Warlike matters, nor Honour; a Funeral Ceremony can never be within their Power; this is a plain Accusation for a wrong to one of their Officers; the Articles charge, that Sir *Henry S. George* by his Office within his Province, hath the ordering of these matters, and the party hath meddled therein without his License; he says, 'tis lawful, and the exercise of a lawful employment; they say, 'tis otherwise, because it belongs to another Man's Office; then 'twas admitted

admitted by the Council for the present to be so, that Sir Henry was an Officer by Letters Patents under the Great Seal of England, (which by the way, makes the Office and rights of it to be of Common-Law Consuance) and the Patent is set forth at large in *Prinne*, on 4 *Inst.* 64, 65. and that the King at Arms hath such a right, yet if any Man intermeddles or incroaches upon that Office; 'tis not a breach of the rules of Honour, and not relating to Arms, but a plain injury at Common-Law, and an Action lies for it, as it doth for the disturbance of any other Office or Franchise.

In 4 *Inst.* 126. 'tis said, that they do upon request Marshal Funerals, but supposing they alone ought to do it, then an Action lies: This is merely a question, whether the Letters Patents do carry such a sole privilege, suppose *nul tiel record* be Pleaded to them, when Pleaded or Inrolled, and without producing them, suppose *non concessit* Pleaded to them when produced, how shall these issues be tried: Suppose they awarded a satisfaction to be made to Sir H. S. by the gift of a Summ of Money; and he should afterwards bring an Action at Law for the same Cause, will the proceeding in the Court of the Earl Marshal be a barr: the Fact alledged in these Articles comes within none of those particulars supposed to be belonging to this Court, in 1 *Inst.* 391.

It matters not, whether these were publick Funerals as was questioned in *Parker's Case*, *Sid.* 352. and in 2 *Keble.* 316. 322. but the Query here is, if this be a point of Honour, or whether it be not about the right of an Office; and if it be the latter, they have no Power to determine it.

The Heralds are Officers attendant upon that Court, but it doth not follow, that that Court can judge of the nature or extent validity or operation of their Letters Patents; no more than the Court Christian can try the right or Freehold of a Chancellors or Registers Office. The Earl Marshal cannot License the doing this in prejudice of the Heralds, or acquit the party if does it, for he still stands liable at Law; the Herald hath a Freehold in it, and may bring his Action notwithstanding.

Then, 3. 'Twas argued, that admitting that no Prohibition did lie to the Court of Honour, or that there was no cause for such Prohibition, yet it ought to be granted to this pretended Court, which is not within their Statute. The true Court is before Constable and Marshal, it is a Court by Prescription, and cannot be altered but by Act of Parliament: All our Books which describe the Court, mention it to be before both, 4 *Inst.* 125. *Crompt.* Jurisdiction, 82. 1 *Inst.* 74. *Stamford.* 65. The Constable is the Chief, and so are the Old Books, and 37 *Hen.* 6. 20. expressly before the Constable and Marshal. The Statutes which mention the Court, do all take notice of it, as held before both: the 8 *Rich.* 2. and that which they Plead, do describe it so: and

the 1 Hen. 4. Cap. 14. the 13 Hen. 4. 4. 5. all Attainders are Pleaded to be before both.

Cambden (who was an Herald) in his Commentary *de Etymologio, antiquitate & officio Comitum Mareschalli Angliae*, fol. 87. 'tis published at the end of his Latin Epistles, which are in 4to, Printed for *Chiswell*, 1691. he endeavours to advance the Office of Earl Marshal, and searches for the Etymology, and after all, makes him but an Harbinger, and tells us when the Title *Mareschallus Angliae* was first used, and how it hath been enjoyed, and by whom, and of what Families, and afterwards 91. lessens his Character much, and derives the Office of Marshal of England from that of Marshal of the Household, which he describes to disadvantage, the same is likewise in *Fleta. lib. 2. cap. 5.*

But this is observable, which *Cambden* says, that the greatest increase of the Authority of this Office hath been, since there were no Constables, for the Kings since that time have referred many things to them, which in former times were proper for the Constable; neither had the Marshal any precedency in respect of his place, until King Hen. 8. Anno 31. by Parliament Assigned him place next to the Lord Constable and before the Lord Admiral: all which, shews that the Earl Marshal never had that Authority time out of mind, to hold this Court before himself alone, as is pretended, during the vacancy of the Office of Constable.

In November, 1640. 'twas Voted by the House of Commons, upon a report from a Committee of some of the greatest Members of the House, *Selden, Hollis, Maynard, Palmer, Hide, &c.* that the Earl Marshal can make no Court without the Constable, and that the Earl Marshal's Court is a grievance, *Rushworth 2 Vol. 1056. Nelson's 1 Vol. 778.*

Spelman in his Glossary, *verbo Mareschallus*, seems to say, 'twas *officium primo Servile*, and that he was a meer Servant to the Constable, and gives much such another account of it, as *Cambden* doth: and pag. 403. is an Abstract or rather Transcript of all that is in the Red Book in the Exchequer about the nature of this Office; and there 'tis said, that if the King be in War, then the Constable and Marshal shall hold Pleas, and the Marshal shall have the Amerciaments and Forfeitures of all those, who do break the Commandments of the Constable and Marshal; and then it was further alledged, by the Council for the Defendant, in the Writ of Error, that they knew of no Statute, Record, or Ancient Book of Law or History, that ever mentioned the Earl Marshal alone, as having Power to hold a Court by himself: So that taking it as a Court, held before an incompetent Judge, a Prohibition ought to go; and the Party ought not to be put to his Action, after he has undergone imprisonment and paid his Fine, since it hath the semblance of a Court, and pretends to act as such; and if it be a Court before the Earl Marshal alone, in case it exceeds the Jurisdiction proper to it, a Prohibition lies either by force of the Common-Law, which states the boundaries and limits of that Jurisdiction, or by force of the Statute of 8,

Rich. 2. which is not repealed by the subsequent Law in that Reign, and if such Prohibition do lie in any Case, that here was cause for it, the subject matter of the Articles being only a wrong (if any) to a private Officer, who had his proper remedy at the Common-Law; and therefore it was prayed that the Judgment should be affirmed, and it was affirmed.

Smith & Ux'

Versus

Dean and Chapter of Paul's London, and Lewis Ruge.

Appeal from a Decree of Dismission made by the Lord Jeffreys, the Bill was to compel the Dean and Chapter, as Lord of the Mannor to receive a Petition in nature of a Writ of false Judgment, for Reversing a common recovery suffered in the Mannor Court, in 1652. whereby a Remainder in Tail, under which, the Plaintiff claimed was barred, suggesting several Errors in the proceeding therein: And that the said Lord might be commanded to examine the same, and do Right thereupon.

To this Bill, the Defendant *Ruge* demurred, and the Dean and Chapter by Answer, insisted, That 'twas the first Attempt of this kind, and of dangerous consequence, and therefore conceived it not fit to proceed on the said Petition, unless compelled thereto by course of Law: That *Ruge* being the Person concerned in interest to contest the sufficiency of the Common-recovery, they hoped the Court would hear his defence, and determine therein before any Judgment were given against them, and that they were only Lords of the Mannor, and ready to Obey, &c. and prayed that their rights might be preserved: This demurrer was heard and ordered to stand.

And now it was insisted on by the Council with the Appellant, that this was the only Remedy which they had, that no Writ of Error or false Judgment lies for Reversing of a recovery or Judgment obtained in a Copyhold Court, that the only method was a Bill or Petition to the Lord, in nature of a Writ of false Judgment, which of common right he ought to receive, and to cause Errors and defects in such recovery or Judgment to be examined, and for this were Cited *Moore 68. Owen 63. Fitz. N. B. 12. 1 Inst. 60. 4 Rep. 30.* is such a Record mentioned to have been seen by *Fenner*, where the Lord upon Petition to him had for certain Errors in the proceedings Reversed such Judgment given in his own Court, *1 Roll's Abridg. 600. Kitchin. 80. 1 Roll's Abridg. 539. Lanc. 98. Edward's Case, Hill. 8. Jac. 1.* by all which, it appears, that this is an allowed and the only remedy;

K 2

Then

Then it was argued, That in all Cases where any Party having a Right to any Freehold Estate, is barred by Judgment, Recovery, or Fine, such Party of common Right may have a Writ of Error, if the same be in a Court of Record; and a Writ of false Judgment, if in a Court Baron or County Court, and reverse such Judgment, Recovery, or Fine for Error or Defect: and there can be no reason assigned why a Copyholder (especially considering the great quantity of Land of that Tenure in *England*) should be without remedy, when a false Judgment is given; and the rather, for that in Real Actions (as this was) the Proceedings in the Lord's Courts are according to those in *Westminster-hall*; and now tho' a Common Recovery be a Common Assurance, yet it was never pretended that a Writ of Error to Reverse it was refused upon that pretence; and if the Lord of a Mannor deny to do his Duty, the *Chancery* hath such a Superiour Jurisdiction as to enjoin him thereto. 'Tis the Business of Equity to see that Right be done to all Suitors in Copyhold Courts, *Fitch. Abridg. Subpena* 21. 2 *Cro.* 368. 2 *Bulstr.* 336. 1 *Rolls Abridg.* 373. If an Erroneous Judgment be given in such Court of a common Person's, in an Action in the Nature of a *Formedon*, a Bill may be in *Chancery* in nature of a false Judgment to Reverse it; and *Lanc.* 38. *Tanfield* says that he was of Counsel in the Case of *Patteshall*, and that it was so decreed, which is much more then what is here contended for; and tho' Common Recoveries are favoured, and have been supported by several Acts of Parliament; yet no Parliament ever thought fit to deprive the Parties bound by such Recoveries, of the benefit of a Writ of Error.

On the other side, 'twas urged in defence of the Dismission, That the Person who suffered this Recovery had a power over the Estate, that she might both by Law and Conscience, upon a Recovery, dispose of it, as she should think fit; that she hath suffered a Recovery, and that it was suffered according to the custom of the Mannor, tho' not according to the form of those suffered in *Westminster-hall*: That the suffering of Recoveries in any Court, and the Methods of proceeding in them, are rather notional then real things; and in the Common Law Courts they are taken notice of, not as Adversary Suits, but as Common Assurances; so that even there, few Mistakes are deemed so great, but what are remedied by the Statute of *Jeofailes*, or will be amended by the Assistance of the Court: And if it be so in the Courts at *Westminster*, where the Proceedings are more solemn, and the Judges are Persons of Learning and Sagacity, how much rather ought this to stand, which was suffered in 1652. during the Times of Disorder, and most Proceedings informal and in the *English* Tongue, in such a mean Court where are few Precedents to guide them: where the Parties themselves are not empowered to draw up their own Proceedings as here above; but the whole is left to the Steward, who is a Stranger to the Person concerned; and therefore

fore 'tis hard and unreasonable, that Mens Purchases should be prejudiced by the Ignorance, Unskilfulness, or Dishonesty of a Steward or his Clerks; that there is scarce one Customary Recovery in *England*, which is exactly agreeable to the Rules of the Common Law; that the questioning of this, may in consequence endanger multitudes of Titles which have been honestly purchased, especially since there can be no aid from the Statutes of Jeofailes, for they do not extend to Courts Baron. 'Twas further urged, That there was no Precedent to enforce Lords of Mannors to do as this Bill desired; that the Lords of Mannors are the ultimate Judges of the Regularity or Errours in such Proceedings; that there's no Equity in the Prayer of this Plaintiff; that if the Lord had received such Petition, and were about to proceed to the Reversal of such Recovery, Equity ought then to interpose and quiet the Possession under those Recoveries: That *Chancery* ought rather to supply a Defect in a Common Conveyance (if any shall happen) and decree the Execution of what each Party meant and intended by it, much rather, than to assist the annulling of a Solemn Agreement, executed according to Usage, tho' not strictly conformable to the Rules of Law. For which Reasons it was prayed that that Appeal might be dismissed, and the Dismission below confirmed, and 'was accordingly adjudged so.

The Countess of Radnor,

versus

Vandebendy & al.

Appeal from a Decree of Dismission in *Chancery*, the Case was to this effect; The Earl of *Warwick*, upon Marriage of his Son, settles part of his Estate upon his Lady for a Jointure, and after failure of Issue Male, limits a Term for 99 years to Trustees to be disposed of by the Earl, either by Deed or Will: And for want of such Appointment, then in trust for the next in Remainder, and then limited the whole Estate in such manner, as that a third part of a Moiety thereof came to the Lord *Bodmyn* (the Appellants late Husband) in Tail general, with the Reversion in Fee to the Earl and his Heirs. The Son died without Issue, the Earl by his Will appoints the Lands to his Countess for so many years of the Term as she should live, and to her Executors for one year after her Death, and charges the Term with several Annuities, some of which remain in being. The Respondent's Father purchased part of these Lands from the Lord *Bodmyn* after his Marriage, and had the Term assigned to him. The Lord *Bodmyn* dyes, the Appellant brings her Writ of Dower in *C. B.* the Respondent pleads the Term for 99 years; and she Exhibits her Bill,

Bill, praying that she may, after the discharge of the Earls Incumbrances, have the benefit of the Trust as to a third of the Profits of this Term; and upon hearing the Cause, the Lord Chancellor saw no cause to give Relief, but dismissed her Bill. There were many Particulars in the Case, and many Proceedings before, both in Law and Equity; but this was the whole Case as to the general Question, Whether a Tenant in Dower shall have the benefit of the Trust of a Term which is ordered to attend the Inheritance, against a Purchaser after the Marriage? The Lord Chancellor Jeffries had been of opinion with the Appellant; but the Cause coming to be heard again, a Dismission was decreed, and now it was argued against the Decree on behalf of the Appellant, that Equity did entitle her to the Thirds of this Term; that a Tenant by the Curtesie is intitled to it, and by the same reason a Tenant in Dower; that the Term created by the Settlement, was to attend all the Estates limited by that Settlement, and in Trust for such Persons as should claim under it, which the Appellant doth as well as the Respondents; that it was in consequence to attend all the particular Estates carved or derived from the others; the Term was never in its creation designed for this purpose, to prevent or protect against Dower; that in the Case of *Snell and Clay*, the Tenant in Dower had it in Chancery against the Heir at Law, and that this was the same Case, a Purchaser with notice of that Incumbrance of Dower, the Vendor being then married; this was an Estate of which the Husband was full Owner, and received the whole Profits; that in proportion, 'tis as much a Trust for her, for her Thirds during Life, as it is a Trust for the Respondents for the Inheritance; the claims under her Husband who had the benefit of the whole Trust: If there be a Mortgage by an Ancestor upon the whole Equity will permit her to redeem, paying her proportion, according to the value of her Thirds for Life; and the same reason holds in this Case; and there's no Precedent in Equity to the contrary: And many Precedents in favour of Tenant in Dower were cited, and much Reason well urged from parallel Cases, to entitle the Lady to her proportion of the Trust of this Term.

On the other side, 'Twas said that Dower is an Interest or Right at the Common Law only; that no Title can be maintained to have Dower, but where the Common Law gives it, and that is only to have the Thirds of that which the Husband was seized of; and if a Term were in being, no Feme was ever let in but after the determination of that Term; that this is the first pretence set up for a Dower in Equity; the Right is only to the Thirds of the Rent reserved upon any Term; and 'tis a new thing to affirm, that there shall be one sort of Dower at Law, and another in Chancery; that 'tis, and always hath been, the common received Opinion of *Westminster-hall*, and of all Conveyancers, that a Term or Statute prevents Dower, that if a Purchaser can procure it, the same becomes his Defence; that this is what the Wisdom of our Fore-

Forefathers thought fit to use, and tho' some Mens reasoning may render it in appearance as absurd, yet the consequence of an alteration will be much more dangerous than the continuance of the old Rules; that tho' this Lady's Case be unfortunate, yet the multitude of Purchasers, who have bought upon full consideration, and have been advised, and still conceive themselves safe under this Law, will be more unfortunate, if the Law be broken. Then 'was argued, That there could be no Equity in this Case, for it must be not only from the Party Appellant, but also against the Respondent, and that 'tis not, because he bought the whole: Her Portion, her Quality, and her being a Wife, create no Equity as to the Purchaser, 'twould perhaps be prevalent against an Heir, but not against him: here's no Fraud or ill Practise, &c. Then if the nature of the thing be considered, the Demand is of a Right, not arising by Agreement of Parties, but by Operation of Law; if the former, *Chancery* might perhaps construe and enlarge it, so as to fulfil the utmost Intention: but here, her title is the Marriage, the Seisin, and Death of the Husband: And there never was a time when, if her Lord had died, she could have had immediate Dower, for even the Term had been pleadable by an Heir of Law to a Writ of Dower: Now what doth give her an Equity against the Respondent? Her Claim is by, from, and under her Husband, as having a Right to a Proportion of what he had, that is a Right by the Law: where is the Equity that should improve or mend this Right? Perhaps it must be agreed, That if the Husband had just before Marriage made a long Lease on purpose to prevent Dower, and the Woman expecting the Privileges which the Common Law gives to Women married, had surviv'd him, Equity might have interposed; and yet even this was practised by a Reverend Judge of Equity, Mr. Serjeant *Majnard*, who made such Lease to his Man *Bradford*, the day before his last Marriage: but here is no such Action, 'twas an old Term created by the old Earl of *Warwick*.

As to the Case of the Mortgages, The Feme intituled to Dower is let in, because the Person who is the Mortgagee hath no Interest but to have his Money; and Equity is to execute all these Agreements, but never where there is a Purchaser, or where the Interest of the Mortgage is assigned to the Heir: Between her self and the Mortgagee, she comes in place of her Husband, and the Husband could redeem, and so may the Wife; but against a Purchaser she has no more Equity than her Husband had, and that is none at all. If she hath a Legal Title antecedent to the Purchaser, as Marriage and Seisin, where there's no Term standing out, that shall prevail, and Equity shall not help the Purchaser against her; so where the Purchaser hath a Legal Title as by a Term precedent, Equity cannot relieve her. And whereas it was objected, That there was no Case adjudged in *Chancery* against the Appellants pretence; the Answer is plain, The Common Law is against it; and if no Precedent in Equity, the Common Law ought to stand: 'Tis nothing but Precedent that Consecrates half the

the Decrees in Equity : And no Man will say, that ever any Woman was endowed in Equity of a Trust Estate. If a Man hath a Term for Ten thousand years, and be entirely and properly owner of it, tho' the same be equal in value to a Fee simple, for the Reversion after it is worth little or nothing, yet no Dower can be claimed in Equity ; nay, If the Husband be seized together with another Person, and not sole seized, yet no Dower, even in *Chancery*, can be claimed against the Survivor : So that Equity doth not exceed the Rules of Law in advancing the Right of Dower. 'Tis true, unless Fraud be in the Case, (according to the Case of *Nash and Preston* in *Cro. Car.* 190, 191.) Relief in Equity shall not be given against a Legal Title to Dower ; yet 'tis as true, that where the Law doth not give Dower, Equity will not, unless there be Fraud and Covin used to prevent it, and then common Reason enjoyns a Court of Conscience to Relieve. If any Allowance had been in the Purchase, upon Consideration of the Title to Dower, the same would have been a very material Argument ; but in this Case there was none : And therefore 'twas prayed that the Dismission might be affirmed, and it was so.

Dominus Rex *versus* Baden.

WRit of Error, to Reverse a Judgment given in the Court of *Exchequer*, and affirmed upon a Writ of Error in the Council Chamber before the Chancellor, with the Assistance of the two Chief Justices. The Case upon the Record was only this ; One *Allen* outlaws one *Clerk* in Debt on a Bond in *Mich.* 1690. on the Seventh of *Jan.* 1690. by virtue of a Special *Capias utlagatum*, and inquisition thereupon, seizes *Clerk's* Lands into their Majesties hand. In *Hillary* Term following the Outlawry and Inquisition are certified into the *Exchequer*, and *Allen* obtains a Lease under a Rent. In *Mich.* 1692. *Baden* comes and pleads that in *Mich.* 4 *Jac.* 2. he recovered a Judgment against *Clerk* for 1080 *l.* that in *Trinity* Term 1691. he took out an *Elegit*, and had a Moiety of the Lands extended, and therefore prays that an *amoveas manus* may be awarded. Mr. Attorney replies, That the Lands were seized by virtue of the Outlawry and Inquisition long before the *Elegit* was sued, and therefore, &c. *Baden* demurs, and Judgment for the King.

It was argued on behalf of the Plaintiff in the Writ of Error, that this Judgment was Erroneous, for that there's a vast difference between an Outlawry in a Civil, and one in a Criminal Process : That in a Civil Action, 'tis only a Civil Process for the benefit of the Party ; and 5 *Edw.* 3. cap. 12. the King cannot pardon an Outlawry at the Suit of a private Person ; that 'tis only to help one Subject to his Debt from another ; that the King hath

no Advantage by it, and so no need of a Preference by reason of the Prerogative; that at Common Law no Man could be outlawed; that now it is purely given for the sake of the Plaintiff; that the common Practise is to make a Lease, or grant a privy Seal to the Party: That by this Outlawry the King hath no Interest in the Land; he cannot cut down the Trees, 9 *H. 6.* 20. that he cannot Plow or Sow; but only collect and receive the Profits which arise out of the Land, *Bro. tit. Outlawry* 36. *tit. Patents* 3. that the King hath not the possession of the Land, which shews it not to be a Forfeiture to the King, but it remains the Parties still, in respect of Ownership, he may make a Feoffment, 21 *Hen. 7.* 7. 2 *Inst.* 675. *Hob.* 122. by the Judgment the Lands were bound, tho' the Title was not compleat, till the *Elegit* was sued out; a *monstrans de droit* or Petition did lye, and now the same Matter may be pleaded. 'Twas further argued, That great Mischief must follow, if an Outlawry upon Civil Process may defeat a Judgment; that Judgments with release of Errors are taken and used as common Securities; that this is most plainly a device to avoid them; that this can be no Security, if an *Elegit* may not be sued, but prevented by the Party himself, for here it is his own default, not to avoid this Outlawry by Appearance; that no act of the Debtor could alter the Security, and there's no reason why his neglect should: that this Contest is between *Baden* and *Allen*; and not between *Baden* and the King. *Allen's* Suit was but just begun, and this is meerly upon his Suit; If the Person had been taken upon this *Capias*, he had been the Plaintiff's prisoner; and if he Escapes the Plaintiff had an Action for it, *Telv.* 19. and the supposed Forfeiture is only for his Interest, 3 *Cro.* 909. And by this practise the King's Prerogative is to assist one Subject to deceive another: By the Law a Judgment is preferable to a Bond, and binds the Land, which a Bond doth not till Judgment upon it; now here the first is to be postponed, by reason of the King's supposed Prerogative, which is only a Right in the King, for the use of the Party to have the Profits, 2 *Rolls Abridg.* 808. *vide Stamford* 57. 1 *Inst.* 30. & *Hardres.* 101, 176. 1 *Inst.* 202. *Latch.* 43. That the *Elegit* hath Relation to the Judgment; and so becomes Prior to the King's Title, like the Relation of a Bargain and Sale to an Inrolment; and as a strong Argument for it, the words in the Writ of *Elegit* were repeated and enforced, *quo die Jud' reddit' fuit*, which shewed a relation to that day; and consequently did affect the Lands at a time when the King had no Interest in it.

On the other side, it was argued with the Judgment, That this was the common Practise of the Court of *Exchequer* in this Case, that the Course of a Court is the Law of that Court, and to be taken notice of by all other Courts, that 'tis time out of mind, and consequently of equal duration with the Common Law, and always deemed to be parcel thereof; that the Records and Experience of the ancient Clerks were both concurring to prove it the common Usage in the *Exchequer*, that when Lands are seized into the K's hands by virtue of an Outlawry and Inquisition, it was never known that

the King's hands, were removed by force of an *Elegit* sued afterwards, tho' upon a Judgment precedent; that it hath been their constant practise to continue the pernancy of the Profits in the King, notwithstanding such *Elegit*; that 'twould be of dangerous Consequence to alter the same by a new Opinion; that 'tis not so very material, whether this practise be more reasonable then another, but whether it be certain and known? for if it be so, 'tis much better to have it continued then changed, because of the Confusion which must follow, by shaking the Rights and Possessions enjoyed under the former Practise: That 'tis not in many Cases so considerable what the Rule is, as that it be fixed and understood; and therefore no reason to alter it, or at least not without the use of the Legislature; for by the same colour that some Judges of Parts and Segacity shall think fit to swerve from their Predecessors, others of less capacity may pretend to do the same, and so nothing but uncertainty would ensue.

But besides, this is not meerly a Course of the Court, 'tis also agreeable to the Rule and Reason of the Laws; *Baden* hath no interest in the Land till he sues his *Elegit*; whereas the King's Title to the Land was compleat by the Outlawry and Inquisition, which was prior to the *Elegit*; and a Judgment of it self doth not affect the Land, till Election made; a Judgment at Law is only an Award of the Court ascertaining of the Debt, and declaring that the Plaintiff shall recover. In it self it doth no more affect the Land, then a Bond; 'tis true, when the Suit is ended by a Judgment, the Party may resort to an *Elegit* for his Execution, if he thinks fit, and can find any thing subject thereto. At the Common Law, before the Statute of *Westminst' 2. cap. 18.* a Subject upon his Judgment for Debt or Damages, could not have Execution by taking away the Possession of his Adversary's Land, because that would hinder the Man's following of Husbandry and Tillage, which then was reckoned beneficial to the Publick: So is *2 Inst. 394.* and *Sir William Herbert's Case, 3 Rep. 11, 12.* nothing but a *Levari* or *Fieri facias*; then by the Statute, *fit in Electione illius*, and *Coke* in his Comment on those words, saith, After the suing of an *Elegit*, he can't have a *Capias*: So that by him, the suing out of the Writ, is the determining of his Election, *2 Inst. 395.* *Foster and Jackson's Case, Hob. 57.* Even the *Elegit* it self doth not (when sued out) immediately touch the Lands; for if that the Chattels be sufficient to pay the Debt, and it so appears to the Sheriff, that thereby he may satisfy the Plaintiff's Demand, then he ought not to extend the Land; and this appears by the frame of the Writ, as 'tis in the *Register 299. 2 Inst. 395.* which shews that no Title can be acquired to the Land, till the same be Extended.

The *Elegit* cannot by Law have relation to the Time of the Judgment, so as to avoid the King's Title; for relation is only a Fiction, and Fiction shall never bind or prejudice the King in his Right, much less in his Prerogative; and no Case can be shewn, where a Relation shall conclude the King:

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nor

nor is it any Objection, That this is a Prerogative for the Benefit of a Subject; for in truth, all the Prerogatives are for the Advantage and Good of the People, or else they ought not to be allowed by the Law. Besides Practise and Reason, there's exprefs Authority in our Books for it, as the Case of *Masters versus Sir Herbert Whitfield* 1657. *Hardres.* 106. And if there were no Book for it, the Practise is enough; for the printing of a Case doth not alter or change the nature of it: 'tis as much Authority if it be not published, as when it is so: *Masters* recovered a Judgment against *Sir Herbert Whitfield*, and after the Judgment *Sir Herbert* was outlawed at another Man's Suit, and his Lands seized into the Protector's hands, and afterwards *Masters* took out an *Elegit*, and the whole Court was of Opinion, that the Lands being seized into the Protector's hands before the *Elegit* was sued out, there could not be an *amoveas manus* awarded, altho' the Judgment was prior to the Outlawry; this is the same with the Case at Bar; and tho' it may be surmised, That this was an Opinion vented in Evil Times, yet 'tis well known, that excepting their Criminal Proceedings in those Times, the Law flourished, and the Judges were Men of Learning, as Mr. Justice *Twissden* hath often affirmed upon the Bench. 'Twas further urged, That Prerogative was to be favoured; that 'twas a part of the Law, 2 *Inst.* 296. especially when 'twas used, as in this Case, to help an honest Man to his Debt; that confessing of Judgments was oftner practised by Fraud to cover Mens Estates, then Outlawries were to defeat just Judgments: That if this Judgment was just and honest, 'twas his own default, not to sue an *Elegit* immediately. Then were cited many Cases to prove the King's Prerogative, as *Fleetwood's Case*, 8 *Rep.* 171. *Tork and Athen's Case*, *Lane's Rep.* 20. *Hob.* 115. 2 *Rolls Abridg.* 158. *Stevenson's Case*, 1 *Cro.* 389, 390. 'Twas argued that nothing could be inferred from *Tanfield's* Opinion in 2 *Rolls Abridg.* 159. which is also in *Lane's Rep.* 65. for there the Debt was not a Debt to the King, till after the Death of the Testator; but here is a Forfeiture to the King before the *Elegit* sued: and admitting that the King hath only the pernancy of the Profits, yet while he hath so, no other Person can intermeddle; for the King is intitled to all the Profits, even to a Presentment to a Church, which was void before the Outlawry, as is *Beverly's Case*, 1 *Leon.* 63. 2 *Rolls Abridg.* 807. and *Oland's Case*, 5 *Rep.* 116. And Process of Outlawry is to be favoured and encouraged, as 'tis a Means for the recovery of just Debts; and the effects of them, by Forfeiture to the King, ought to be favoured as a Prerogative, wherewith the King is intrusted to that purpose: 'Tis a Penalty or Judgment upon him to be put *Extra Legem*, because he contemns the Law, and will not obey it; so that as to him, 'tis the greatest Justice in the World, that he should not enjoy any benefit of his Estate by virtue of the Law, during the time that he despises it. And as to *Baden*, 'twas his own default that he did not extend sooner; he trusted the Party longer then he should, and for that he may thank himself: Wherefore upon the whole, 'twas prayed that the Judgment should be affirmed, and it was affirmed.

Hall & al' Executors of Tho. Thynne,

Versus

Jane Potter Administratrix of George Potter.

Appeal from a Decree of Dismission in the Court of *Chancery*: The Case was thus; That *Thomas Thynne* Esq; having intentions to make his Addresses to the Lady *Ogle*, gave a Bond of 1000 *l.* Penalty to the Respondents Husband to pay 500 *l.* in Ten days after his Marriage with the Lady *Ogle*; the Respondent assisted in promoting the said Marriage, which afterwards took effect; soon after the said *Thynne* was barbarously murdered; and about six years after Mr. *Potter* brought an Action upon this Bond against the Appellants, as Executors of Mr. *Thynne*, and proving the Marriage, recovered a Verdict for the 1000 *l.* Thereupon the Appellants preferred their Bill in *Chancery* to be relieved against this Bond, as given upon an unlawful Consideration; the Defendants by their Answer acknowledge the Promotion of that Marriage to be the Reason of giving the Bond. Upon hearing the Cause at the *Rolls*, the Court decreed the Bond to be delivered up, and Satisfaction to be acknowledged upon the Judgment. The Respondent petitioned the Lord Keeper for a re-hearing; and the same being re-heard accordingly, his Lordship was pleased to Reverse that Decree, and ordered the Respondents to pay Principal, Interest and Costs, or else the Bill to stand dismissed with Costs.

And it was argued on behalf of the Appellants, That this Bond ought in equity to be set aside, for that even at the Common Law, Bonds founded upon unlawful Considerations appearing in the condition were void; that in many Instances, Bonds and Contracts that are good at Law, and cannot be avoided there, are cancelled in Equity: That such Bonds to Match-makers and Procurers of Marriage are of dangerous Consequence, and tend to the betraying, and oftentimes to the ruin of Persons of Quality and Fortune: And if the use of such Securities and Contracts be allowed and countenanced, the same may prove the occasion of many unhappy Marriages, to the prejudice and discomfort of the best of Families; that the Consideration of such Bonds and Securities have always been discountenanced, and Relief in Equity given against them, even so long since as the Lord *Coventry's* time, and long before; and particularly in the Case of *Arundel* and *Trevilian*; between whom the Fourth of February, 11 Car. 1. was an Order made in these, or the like words: *Upon the hearing and debating of the Matter this present day in the presence of the Counsel Learned, on both sides, for and touching the Bond or Bill of 100 l. against which the Plaintiff by his Bill prayeth relief. It appeared that the said Bill was originally entred into by the Plaintiff unto the Defendant for the payment of 100 l. formerly promised unto the said* Defen-

Defendant by the Plaintiff, for the effecting of a Marriage between the Plaintiff and Elizabeth his now Wife, which the said Defendant procured accordingly, as his Counsel alledged. But this Court utterly disliking the Consideration whereupon the said Bill was given, the same being of dangerous consequence in precedent, upon reading three several Precedents, wherein this Court hath relieved others in like Cases, against Bonds of that nature, thought not fit to give any countenance unto Specialties entred into upon such Contracts : It is therefore ordered and decreed, That the said Defendant shall bring the said Bill into this Court, to be delivered up to the Plaintiff to be cancelled. Then 'twas further urged, That the Appellants had once a Decree at the Rolls to be relieved against the Bond in question, upon consideration of the said Precedent in the time of the said Lord Coventry and others ; and of the Mischiefs and Inconveniencies likely to arise by such Practises, which increase in the present Age, more then in the Times when Relief was given against such Bonds : and therefore 'twas pray'd that the Decree might be Reversed.

On the other side it was urged, That the Consideration of this Bond was lawful ; that the assisting and promoting of a Marriage at the Parties request, was a good Consideration at Law, in all Times, to maintain a Promise for payment of Money : That this Bond was voluntary, and the Party who was Obligor was of Age and sound Memory ; that here was no Fraud or Deceit in procuring it ; that *Chancery* was not to Relieve against Voluntary Acts ; that here was a great Fortune to be acquired to the Appellant's Testator by the Match ; that here was Assistance given ; that the Persons were both of great Quality and Estate, and no Imposition or Deceit on either side in the Marriage : That it might be proper to Relieve against such Securities, where ill Consequences did ensue ; yet here being none, and the thing lawful, and the Bond good at Law, 'the same ought to stand ; that here are no Children Purchasers or Creditors to be defeated ; that there are Assets sufficient to pay all ; and consequently there can be no Injustice in allowing this Bond to remain in force ; that it was the Expectation of the Respondent, without which she would not have given her Service in this Matter ; and that it was the full meaning of the Appellant's Testator to pay this Money, in case the Marriage took effect ; that there was a vast difference between supporting and vacating a Contract in *Chancery* ; that tho' Equity perhaps would not assist and help a Security upon such a Consideration, if it were defective at Law ; yet where it was good at Law, and no Cheat or Imposition upon the Party, but he meant (as he had undertaken) to pay this Money, and was not deceived in his Expectation, as to the Success of the Respondent's Endeavours, 'twould be hard in Equity to damn such a Security, and therefore 'twas prayed that the Decree should be affirmed.

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It was replied, That Marriages ought to be procured and promoted by the Mediation of Friends and Relations, and not of Hirelings; that the not vacating such Bonds, when questioned in a Court of Equity, would be of Evil Example to Executors, Trustees, Guardians, Servants, and other People having the Care of Children. And therefore 'twas prayed that the Decree might be reversed, and it was reversed accordingly.

The Society of the Governour and Assistants, London, of the new Plantation of Ulster in the Kingdom of Ireland,

Versus

William Lord Bishop of Derry.

Appeal from a Judgment by the Lords Spiritual and Temporal of *Ireland* in Parliament assembled, upon the Bishop's Petition and Appeal to their Lordships form an Order in the *Chancery*, touching certain Lands in the County and Liberties of *London-Derry*: It sets forth, amongst other things, (after a recital of the Proceedings in *Chancery* and the Merits of the Cause) that the Appellants were advised, that no Appeal lyes to the House of Lords in *Ireland* from the Court of *Chancery* there, but that all Appeals from thence ought to be immediatly to their Lordships here, the Supreme Judicature as well for Matters arising in *Ireland* as in this Kingdom: and therefore in the Conclusion, prays that an Order might be made for the said Bishop to appear, and put in his Answer thereto, that the Matter might be heard before their Lordships here, when it should be thought fit, and that the Petitioners might receive such relief as should be agreeable to their Lordships great Wisdom and Justice, &c.

Upon presenting this Appeal to the Lords here, the House appointed Lords Committees to consider the proper method of Appealing from the Decrees made in the Court of *Chancery* in *Ireland*, and to report, &c. Then pursuant to an Order made by the Lords Committees, and a Letter sent to the Lords Justices of *Ireland*, by Order of the House of Lords here. Some Precedents or Cases from *Ireland* relating to the method of appealing from the *Chancery* there, were brought before the said Committee, and reported to the House; whereupon the House ordered that both Parties might have Copies of the same.

Then the Society took Copies, and preferred a short Petition to the House, setting forth the said matter, and that they were ready by their Council to offer several things, in order to their Lordship's receiving and proceeding upon their said Appeal, where-

whereupon, a day was appointed for the hearing of Council on both sides, with regard to Jurisdiction.

And, It was accordingly argued on behalf of the said Society, that the Judgments in *Ireland*, whether in Law or Equity, were not to be finally Determined there, that *Ireland* was dependant upon *England*; 'twas urged to prove it, that our Money was to be Current there, that our Laws did oblige them, that they were governed *secundum leges & consuetudines anglicanas*, Davis 21. in which Book 24. that the Easterlings in *England*, who first made the Money of this Standard, (and from whose Name comes that of *Sterling*.) were the first Founders of the four Principal Cities of *Ireland*, *Dublin*, *Waterford*, *Corke*, and *Linrick*, and the other Maritime Villes in that Country, and were the sole Maintainers of Traffick and Commerce there, which were all utterly neglected by the *Irish*.

These Cities and Villes were under the Protection of King *Edgar*, and *Edward* the Confessor, before the *Norman* Conquest, and these Easterlings in Ancient Record, are called *Ostmanni*; and therefore when *Hen. 2.* upon the first Conquest, after their Apostacy, thought fit to People those Cities and Villes with *English* Colonies drawn from *Exeter*, *Bristol*, and *Chester*, &c. he assigned to them a certain proportion of Land, next adjoyning to each of those Cities, which Portion, is called in the Records in Ancient time, *Cantreda Ostmannorum*; Davis 25. says further, that *Ireland* is a Member of *England*, & *Inhabitantes ibidem legibus Anglie subjiciuntur & utuntur*.

In the Statute of Faculties, 28 *Hen. 8. cap. 19.* 'tis mentioned to be the King's Land of *Ireland*, and that this the King's Land of *Ireland*, is a Member Appendant, and rightfully belonging to the Imperial Crown of the Realm of *England*, and united to the same. And in the 33 *Hen. 8. cap. 1.* by which the Stile and Title of King of *Ireland*, was given to *Hen. 8.* his Heirs and Successors; 'tis further Enacted, that the King shall enjoy this Stile and Title, and all other Royal preeminences, Prerogatives, and Dignities, as united and annexed to the Imperial Crown of *England*.

Nay, It may be compared to a County-Palatine, Created by the King of *England*; for, Davis 62. speaking of that, he says, that a County-Palatine hath in it, *jura regalia*, which consists in Royal Jurisdiction, and Royal Seignory. By the first, it hath all its High Courts and Officers of Justice which the King hath; and by the latter, it hath Royal Services, and Royal Escheates, as the King hath; and therefore in some respects, 'tis separated and disjoyned from the Crown, as is *Plowd. 215.* yet 'tis subordinate and dependant; though it be said, that *breve Dom' Regis non Currit* there, yet the Writ of Error, which is the dernier resort and in like manner an Appeal, is excepted out of their Charters; so is *Dyer 321.* and 345. 34 *Hen. 6. 42.* and it would be excepted, if it were not so expressed; for to have the ultimate Judgment, is that which the King cannot grant, for such grant, would (if allowed) alter the

the fundamental constitution of the Realm. So, in *Ireland*, which is a Realm of it self, as Consisting of many Counties, Erroneous Judgments given in the chief place there, shall be reversed in the King's Bench in *England*; *Davis* quotes *Bracton*, lib. 3. tit' coron' cap. 8. that *Comites Palatini habent regalem jurisdictionem in omnibus, Salvo Dominio Regi sicut principi*; so that by his Opinion, they are much the same; and no Man will deny, but that in all Proceedings in Law or Equity, the last resort is to the Parliament of *England*; there it is that the King's supreme Authority is exercis'd.

It must not be said to be a Conquered Country, for the Earl of *Stafford's* sake, though *Coke* and *Vaughan* have affirmed it so: But it may be call'd a Plantation or Colony, dependant upon *England*, and to many purposes, parcel of it. This hath not only the same person for their King, but 'tis under the Crown and Government of *England*; there must be in all these Cases a Superiority or superintendency over inferiour Dominions; for otherwise, (as *Vaughan* puts it, 401.) the Law appointed or permitted to such places might be insensibly changed within it self, without the assent of the Dominion Superiour. And, 2. Judgments or Decrees might be there made or given to the disadvantage or of lessening that Superiority, which cannot be reasonable, or to make the Superiority to be only in the King, not in the Crown of *England*, (as King *Jac.* 1. would have had it, and consulted *Selden* upon the point.)

Now though the Writ of Error be only mentioned, yet the same reason holds to both; and the true cause, why we have not so many Ancient precedents of Equity Cases as of Law ones, is, for that in Ancient time the Equity Courts were not so high, meddled with few matters, and in a Summary way; but since their Authority is so advanced, and their Jurisdiction so enlarged, that most questions of property are become determinable there, and almost every suit begins or ends with them, to the entire subversion of the Old Common-Law. It is and must now be reasonable to have the Examination of their final Sentences in the Parliament of *England* as well as of the other.

Suppose non-residence in *Ireland* should be pretended, a Forfeiture of the Estate to the next remainder Man or to the King. Can it be safe for to intrust them with a conclusive Opinion in this matter. When *Calais* was in our hands, Writs of Error lay thither, 21 *Hen.* 7. fol. 3. As to the pretence, that the orders of this House cannot be executed there; 'tis very vain, for if the King's Bench Command their Judgments to be executed there; this House may order theirs; and in like manner as they do to the Chancery here.

In 15 *Rich.* 2. numb. 17. in the Abbot of *St. Osithe's* Case, the Lords here made an Order, and charged the Lord Chancellor that he see it performed; and this hath been constant practice.

It hath been imagined, That the Jurisdiction of this House in matters of this kind, is dated from the 21 Jac. 1. as to the proceedings in *Chancery*; but that is not now to be disputed; for, the Commons in Parliament Assembled, did agree it to be the Right of this House; in the Case of *Skinner* and the *East-India* Company; and in the Book about it, supposed to be written by that Noble Lord, the Lord *Hollis*, 105. 'tis said, that where the King's Sovereignty doth not reach, the Jurisdiction of this House cannot; the contrary is implied, that where the King of England's Sovereignty doth extend, the Jurisdiction of this House doth so too; and no Man will affirm, That *Ireland* is out of or beyond the limits of the Sovereignty of the *English* Crown. And as to the exercise of this Judicature by the Lords here, nothing can be stronger for it, then the 1 Hen. 4. numb. 79. So 'tis in the Record, though in *Cotton's Abridg* 'tis 80. the Commons declare that all Judgments Appertain to the King and Lords, and not to them; *Skinner's Case*, 199, 200. 4 Inst. 349, 353, 354.

It was further argued, That Protection commands a due Subjection, and that these people who insisted upon this independency, had forgot the English Treasure and Bloud, which had been spent for their preservation.

That they are part of *England* and subject to its Laws, appears from the common Case of an incumbency here, being made void by acceptance of a Bishoprick in that Colony: Besides, that in Ancient time the Arch-Bishop of *Canterbury* was Primate of *Ireland*, and had the Confirmation and Consecration of Bishops there, *Cambden's Britt.* pag. 735. and 765. 4 Inst. 360. then 'twas urged that the Question now was, whether it were a Dominion inferiour, or equal to and independant upon the Realm of *England*: That the constant practice had been for the Lords here to examine the Decrees in their Court of *Chancery*, that the refusing of this Appeal, would shake all those Cases thus determined; that every Appeal here from their Equiry Sentences, (which have been very many) was an Argument against the Order of their Lords, and for the receiving of this Appeal here: That this thing hath been acknowledged, even by the Rebels there; for in Sir *John Temple's* History of the first Progress of the *Irish* Rebellion, written 1641. pag. 141. amongst the several propositions made by the *Irish* (then in a general Rebellion) these two are mentioned.

1. That by several Acts of Parliament to be respectively passed in *England* and *Ireland*, it should be declared, that the Parliament of *Ireland* had no subordination to the Parliament of *England*, but should have supreme Jurisdiction in that Kingdom, as Absolute as the Parliament of *England* here hath.

2. That the Act of 10 Hen. 7. called *Poyning's Act*, and all other Acts expounding or explaining that Law, should be Repealed; both which with their other dangerous propositions were justly rejected: however, it shews their Opinion, that at that time the Law was, or was taken and deemed to be against them

in this point; and there is as much reason for keeping the final Judicature here, as there is for maintaining the Superiority and Obligatory Power over them in the legislature.

'Twas farther urged, That the with-holding the *Irish* Lords from having the like Jurisdiction in their Parliament as the Lords in *England* have, in Judging upon Appeals and Writs of Error, was absolutely necessary for the preserving of the Possessions of the *English* in *Ireland*; for those of that Country must be suppos'd to incline to their own interest, and cannot be suppos'd so much inclined to love and affect the *English* amongst them: And that this Power of Judging here is Co-eval with the very Constitution of the Government.

'Twas further urged, That their Precedents returned, did, or concern the point in Question, except the two or three Cases in 1661, and 1662. and two Appeals lately in 1695. that their Case of the Prior of *Lanthony* in 8 *Hen.* 6. *Prynnes* Animadversions, 313, 314. was against them; the Prior having removed a Judgment in the *King's-Bench* in *Ireland*, into the Parliament there, which affirmed it, did bring a Writ of Error in the *King's-Bench* in *England*, and they refused to meddle with it; the reason was, because the Writ of Error before the Lords there did not lie, and that it ought to have come hither immediately; and all the rest of their Quotations in their Printed Case either prove nothing at all, or too much; for they are against the allowance of Writs of Error in the *King's-Bench* in *England*, and against the Legislature of *England's* being able to oblige the people of *Ireland*, both which have been approved by constant practice, and therefore it was prayed, that the Appeal here might be allowed, and the Order of the *Irish* Lords might be vacated.

On the other side, it was argued, from 1 *Inst.* 141. *Prynne's* Animadversions, 286. and 4 *Inst.* 12. that their Parliaments had the same Authority there in respect of making Laws for that Country as the Parliaments have for *England*; that they have ever since, 10 *Hen.* 7. Re-enacted there such subsequent Acts of *England*, as they thought good for them; and that they had the like Power of Appeals, Writs of Error and Impeachments, &c. and, that the Cognizance of such Appeals in *England* would produce great inconveniencies, by making poor people to attend here; whereas, they might with less trouble and expence have Justice at home; that this did agree with the reasons of that Ancient Statute, 4 *Inst.* 356. that persons having Estates in *Ireland*, should Reside in that Kingdom, else half of their Estates should go to maintain the Forts there: That this practice of receiving Appeals here would be vexatious to the people of that place; and that no Court could have Jurisdiction but by grant or prescription, and that there could be no pretence for either in this place.

Then was it ordered in these or the like Words;

Whereas, a Petition and Appeal was offered to the House the — Day of — last, from the Society of the Governour and Assistants London of the New Plantation in Ulster, in the Kingdom of Ireland, against a Judgment given by the Lords Spiritual and Temporal of Ireland, in Parliament there Assembled, on the — day of — last upon the Petition and Appeal of William Lord Bishop of Derry against the Decree or Orders made in the said Cause in the Court of Chancery there: Whereupon a Committee was appointed to consider of the proper method of Appealing from Decrees made in the Court of Chancery in Ireland; and that pursuant to the Orders of the said Committee, and a Letter sent to the Lords Justices of Ireland, by Order of this House, several precedents have been transmitted to this House, by the said Lord Justices, Copies whereof were ordered to be delivered to either side: After hearing Counsel upon the Petition of the said Society of London, presented to this House, praying that they might be heard as to the Jurisdiction of the House of Lords in Ireland, in receiving and judging Appeals from the Chancery there, as also Counsel for the Bishop of Derry; after due Consideration of the Precedents, and of what was offered by Counsel thereupon; It is ordered and adjudged by the Lords Spiritual and Temporal in Parliament Assembled, That the said Appeal of the Bishop of Derry, to the House of Lords, in Ireland, from the Decree or Orders of the Court of Chancery there, made in the Cause, wherein the said Bishop of Derry was Plaintiff, and the said Society of the Governour and Assistants London of the New Plantation in Ulster in Ireland, were Defendants, was coram non iudice, and that all the proceedings thereupon, are null and void, and that the Court of Chancery in Ireland, ought to proceed in the said Cause, as if no such Appeal had been made to the House of Lords there; and if either of the said Parties do find themselves Agrieved by the said Decree or Orders of the Chancery of Ireland, they are at liberty to pursue their proper Remedy by way of Appeal to this House.

Sir Caesar Wood alias Cranmer

versus

Duke of Southampton.

A Appeal from a Decree in Chancery, the Case was thus; Sir Henry Wood, the Appellant's Uncle, makes a Settlement, in Consideration of a Marriage to be had between his Daughter Mary and the Duke, &c. to the uses following, i.e. in Trust, to Receive and Pay out of the Profits 450 l. a Year, to the Lady Chester, for the Education and Maintenance of his Daughter, till twelve

M 2

Years

years of Age, then 550 *l.* a year till Marriage, or Seventeen years of Age, which should first happen: and in Trust to pay the Residue of the Profits to the Duke after Marriage, he first giving Security to the said Trustees to provide Portions and Maintenance for the Daughters of that Marriage equal to the Sum he should receive; and in case there should be none, then the same Money to remain to the Respondent, and if the said *Mary* should die before Marriage, or Age of Seventeen years, to such Uses as Sir *H. W.* should appoint. And if *Mary*, after Sir *Henry*'s death, die under Sixteen, the Respondent then unmarried to any other Woman, or after and before Seventeen, the Respondent then living and unmarried; or if before Seventeen she should marry any other, or if she should refuse the Respondent, then 20000 *l.* out of the Profits to the Duke.

But if the said Marriage shall take effect after *Mary*'s Age of Sixteen years, and she shall have Issue Male by the Respondent, then for the better Settlement of the Premises upon the Issue Male, and a more ample Provision and Maintenance for the Respondent and his Wife, and the longest Liver of them, in Trust for the said Duke and *Mary*, for and during their Lives, and the Life of the longer liver of them; and after their Deaths, to the first Son, &c. in Tail Male; and for default of Issue Male to the Daughters. And for default of such Issue in Trust, for such Persons only as Sir *Henry* should appoint, and in default thereof to the right Heirs of Sir *Henry*.

Sir *Henry W.* at the same time, makes his Will, tho' dated after the Settlement, reciting that he had settled the Premises upon the Duke and *Mary* for their Lives, and the Life of the longer liver of them, &c. and confirms it; and in Case the said Marriage should not take effect, according to the Limitations of the Settlement; or if the said Respondent should die without Issue by *Mary*; or if he have Issue by her, and that Issue die without Issue, then the Remainder to *Mary* for Life, and afterwards to her first Son; and after several mediate Remainders, then to the Appellant for Life, &c. and after to *Thomas Webb*, &c.

Sir *Henry Wood* dies, the Marriage between *Mary* and the Duke afterwards takes effect upon her arrival to years of Consent: and they lived in that state, till she was near Seventeen years of Age, and then she dies without Issue.

The Court of *Chancery* decreed the Profits of the Estate to the Duke for Life.

It was argued for the Appellant, That here was a precedent Copulative Condition; that if the Marriage take effect after Sixteen, and there be Issue, then to the Duke; and neither of these being in the Case, the Decree is not consistent with the positive words of the Settlement, for that the Duke was to have it upon no other terms: That by this Settlement the Duke was thus provided for:

1. If the Marriage did not take effect, by *Mary*'s refusal or taking another Husband, the Duke was to have 20000 *l.*

2. If the Marriage did take effect, and Issue was had, then the Duke was to have an Estate for Life, but not otherwise; that the words are plain and certain, that there must not only be a Marriage, but Issue Male between them; that tho' it should be agreed to be a good Marriage within the intention of the Settlement, the living till after Sixteen years of Age, yet when a Condition Copulative, consisting of several Branches (as this doth) is made precedent to any Use or Trust, the entire Condition must be performed, or else the Use or Trust can never rise or take place: And it is not enough that one part only be performed.

As to the Objection from the intention of the Parties, 'twas Answered, That no such Intention did appear, or reasonably could be collected from any thing in this Deed or Will: and it would be too great a violence to the words, to break that Condition into two, which is but one, according to the plain and natural Contexture and Sense of it.

It hath been said, That if the Duke cannot take an Estate for Life in the Trust, unless he had Issue Male by the Dutchess, then she her self could not take for Life by that Trust, unless there were Issue Male, for that their Estates are limited together; and then the Consequence would be, That if there were Daughters and no Sons, the Daughters would have the Trust of the Estate in their Mother's Life time, and their Mother nothing, which could not be the intent of Sir Henry Wood.

To this it was answered, That the same arises from a plain Mistake, and a Supposition that the Daughters (if any) should take, tho' there never were a Son; whereas the Limitation to the Daughters is under the same precedent Condition, as the Limitation to the Duke and Dutchess is: For the precedent Copulative Condition ushers in the whole Limitation of the Trust, so that the Trust to the Daughters could no more arise, without Issue Male born, than the Trust to the Duke and Dutchess.

And whereas 'tis pretended, That at this rate the Duke and Dutchess were to have had no Subsistence, till the Birth of Issue Male, which might be many years: it was answered, That this was a plain mistake of the Law; for this Trust being by the Deed and Will thus limited upon this precedent Condition of having Issue Male, they whose Estates in this Trust are thus limited upon this Condition, can take nothing till the Condition be performed by Marriage and Issue Male; and then by the Rules of Law, till some of those Persons to whom the Trust was limited, could take, the Trust of the Estate descends to the Heir at Law, and she was intitled to the Profits, till the precedent Condition should be performed, or become impossible; and if the Condition had been performed, the Trusts would have taken effect; and being not performed, but becoming impossible by the Dutchess's death before she had Issue, the subsequent Trusts take effect upon her death.

death. Besides that, it is pursuant to the Rules of the Common Law, which gives to the Husband no Estate for Life in the Wives Inheritance, unless he have Issue by her born alive; wherefore it was prayed that the Decree might be reversed.

Then it was argued on the behalf of the Respondent, That *Sir Henry Wood* by the same Settlement directs, that if the Duke died before his Marriage with her, then the Trustees should dispose of the Profits of the Premises to the Lord *George Palmer*, the Duke's Brother (in case the Brother married her) and to the said *Mary* for their Lives, and the Life of the longer Liver of them: And from and after the decease of the Survivor of them, then to their Issue in Tail Male, &c. without adding any words of a preceding Condition; and yet says, *In like manner, and for the like Estates, as he had appointed for his said Daughter and the Duke, in case of their Marriage*; which plainly evidences his intention to be, That the said Duke and the Lady *Mary* should have the Profits during their Lives, altho' they should never have Issue Male, as the Brother would have had in case he had married her.

Then 'twas urged, That *Sir Henry Wood's* appointing the Surplus of the Profits, over and above her said Maintenance, for the benefit of the Duke, until his Marriage, shows the intent, for that it can't be imagined that he should be provided for before his Marriage, and left destitute of all Support after it, unless he had Issue Male by her. Nay, his intention of Kindness to the Duke was proved further, by giving him 20000 *l.* in case she refused to marry him, or died before her Marriage.

And as to the Pretence of its being a Condition precedent; it was answered, That unless that Paragraph be made to interfere with it self, the Duke will be intitled to an Estate for Life, if there were no other Clause in the Deed.

For first, It's said, *That for a more full and ample provision for the said Duke and his Wife, the Trustees, &c.* Which words (according to the Construction of the Appellant's Counsel) must be useless and void, unless the Duke were not after Marriage to have as great, if not greater Supply, then he had before the Marriage.

Then 'tis said, *That they should be seized in Trust for the Duke and his Wife, and the Survivor of them, for and during their natural Lives, and the Life of the longer Liver of them.* And from thence 'twas argued, That the meaning and import of the words (*for and during*) can be nothing less than the whole Duration and Continuance of their Lives, from and after *Sir Henry's* Death and their Marriage.

Then the Will of *Sir Henry* proves the Intention, for that it recites, That he had settled from and after his Decease, the Premises in Trust for the Duke and the said *Mary* during their Lives, and the Life of the longer Liver of them, and takes no notice of the pretended precedent Condition; which shows that he designed

signed them the Profits immediately after his Decease and the Marriage.

Then in the Limitations over, they are not to take any benefit of or by the Premises, until the death of the Duke and his Wife without Issue; therefore it must be understood, that the Profits in the mean time should remain to the Duke and his Wife, or the Survivor of them. And then it was further observed, That the Duke comes in as a Purchaser upon as valuable a Consideration as any in the Law, viz. Marriage; and the Limitation over to the Respondent is a voluntary Settlement.

And as to the Objection of the Marriage being before Sixteen, it was not much insisted on the other side, and in reason cannot be; because her continuing married till after Sixteen, doth fully satisfy the intent of the Deed, in reference to this Matter. And many other Reasons were urged from the Intent of the Parties, and the Nature of the Interest, the same being a Trust Estate, and proper for Equity to constitute. And upon the whole it was pray'd that the Decree might be affirmed, but the same was reversed.

Sir Caesar Wood *alias* Cranmer,

Versus

Thomas Webb.

Appeal from a Decree in Chancery. The Case was founded upon the next preceding; The Respondent was one of the Coheirs of Sir Henry Wood, and claimed a Moiety of the Profits of the Premises during the Duke's Life, and the same was decreed accordingly. And now it was argued on the behalf of the Appellant, That in this Deed there was no Appointment to the Respondent, till after the death of the Appellant and his Issue; that all the pretence for Webb's Claim, was, That the Trust to the Appellant, was not to take effect till the Duke's death, altho' the said Duke had no Interest in the Estate; as hath been adjudged by the Supreme Judicature of the Realm, that by the whole purport and design of the Settlement and Will, and the positive words of it, Sir Henry Wood intended the said Trusts in Succession and Order, as they are mentioned, that the Design of the whole, was not to give any thing to the Respondent, till after all the mediate Limitations were spent.

It was argued on the other side with the Decree, That this Right of the Respondent to a Moiety as long as the Duke lives, is a necessary Consequence of the Lord's Judgment in the other Case; that the same is founded upon fixed and established Rules of Law; as that an Heir is not to be disinherited by Construction or Implication,

eration, but by plain and express words; nor will the Law give away an Estate, or make it to Commence sooner than the plain and express words will warrant; that wherever an Estate is limited in Remainder, that depends upon a Contingency or a Condition precedent, there, till the Condition be performed or Contingency happens, that Estate cannot Commence; that this was the foundation of the Argument for the Appellant, in the other Case: And the same Rules hold here; for here is a precedent Condition; for after the Marriage once had, the Duke must die, and die without Issue, or that Issue die without Issue, before the Appellant can take.

The Owner says that the Appellant is not to have it till then; that there is not one Reason which can be urged against the Duke, but may with equal force be urged against the Appellant in this Case; that the Respondent claims not by the Settlement, but as a Coheir, to have that which is not disposed of; and what is not so disposed, must descend or result for the benefit of the Heirs. Wherefore it was prayed that the Decree should be affirmed; and it was affirmed.

The Bishop of Exeter & al,

versus

Samson Hele.

Writ of Error upon a Judgment in a *Quare Impedit*

in C. B. affirmed in B. R.

The Case upon the Record was this:

HEle brings his *Quare Impedit*, as seized of the Mannor of Southpole in Count Devon, to which the Advowson of the Church of Southpole belongs in his Demesne, as of Fee, and so being seized, he presented thereunto, when vacant, John Ull, his Clerk, who at his Presentation was admitted and instituted; that it became void by his death, and belonged to him to present; and that the said Bishop and Guynyn Hayman hinder him and dampen him.

The Defendants came and defend *vim & injur quando, &c.* and the Bishop says, *non, quia dicit*, that the Church is within his Diocese; and that he claims nothing in it but as Ordinary; that 'tis a Benefice with Cure of Souls; that 15 April, Anno Willielmi & Mariae secundo, it became void by the said Incumbent's death, he being Ordinary, after which Vacancy, and within Six Months *prox post mortem prae J. U. viz.* 19 May, *eodem Anno*, the Plaintiff presented to him one Francis Hodder as his Clerk, which said Francis was a Person *in Literatura minus sufficiens seu capax ad habend*

habend' dictam Ecclesiam. Super quo præd' Episc' as Ordinary of the Church aforesaid, did according to the Ecclesiastical Laws Examine him of his Ability and Fitness in that behalf, ut de jure debuit, and upon such Examination, he found him to be a Person, in Literatura insufficient' ac ea ratione fore personam inhabil' & minime idoneam ad habend' the said Benefice with Cure of Souls, per quod, the said Bishop as Ordinary did refuse him; of which, after the said Refusal, the Bishop within the six Months, did give the Plaintiff notice, viz. 20th June, Anno supradict' and that he might present another Person to the said Church, that the Plaintiff did not present any other within the six Months, per quod, it belonged to the Bishop as Ordinary of the place, to Collate a fit and proper Person; and thereupon, he did Collate Gawnin Hayman, who was instituted and inducted, & hoc parat' est verificare unde pet' Jud' &c.

The Incumbent pleads the same Plea, Mutatis mutandis.

The Plaintiff replies, That Hodder at the time of the Presentation, and long before, was, Vicar of the Parochial Church of Uxborough, in Com' præd'; and to that Vicaridge, lawfully admitted, instituted, and inducted, & homo Literatus infra Sacros ordines constitut' & in verbo Dom' Doct' & instruct' & post Doctrinæ & Literat' examen ordines Sacerdotales per ordination' Episcopalem adeptus fuit & intuitu Spiritualis Domi & favente Deo in ea parte contingent' ad predicand' verbum Dei in & per Dioecesim Exon, by Anthony late Lord Bishop of Exon, Licentiat' curam; habens & exercens Animar' & Divino Servitio per multos Annos assidue incumbens & Divinum Servitium Celebravit & adhuc Celebrat, & ad Divina Servitia Celebrand' Scil' in legendo Orando, Prædicando & Sacra Ministeria ministrand' Satis & Sufficenter Literatus vixit apud Southpole præd' & hoc par' est ver' unde petit Jud' &c.

The Defendants rejoyn, That *protestando*, that Hodder was never Vicar of Uxborough, nor in Orders, nor Licensed to Preach, *pro placito*; they say, that Hodder when Presented, was a Man illiterate, and that they are ready to aver, *ubi & quando prout curia, &c.*

The Plaintiff surjoyns, That Hodder was Vicar, in Orders, and Licensed, *prout, & hoc petit quod inquiratur per patriam*, and the Defendant's Demur. & Jud' *pro quer' & affine en B. R.*

It was argued on behalf of the Plaintiffs, in the Writ of Error, that this Judgment and the affirmance of it were Erroneous.

For, That the Ordinary had in this Case, a Power of examining this Presentee, notwithstanding their pretence of Orders and License, and the former Examination by Dr. Sparrow, late Bishop, and consequently their Replication and Surrejoinder are naught, for they rely upon that and nothing else.

'Twas insisted on below, That a Parson once Ordained, is certainly presumed to have sufficient Learning for any Cure of Souls; nay, that such Examination upon his Ordination, shall conclude any succeeding or other Ordinary from Examining such a Person when Presented to a Benefice, but this is contrary both to Reason and Law, and so agreed by most of the Judges, who delivered their Opinions for the Plaintiff in the Action below.

'Tis against all Reason and Sense, That because one Ordinary thought him able to take Orders and Preach in his Diocess, therefore, another must deem him able and sufficiently Learned (tho' he knows the contrary) to accept a Benefice in his Diocess; 'tis Absurd, that upon a Presentation, he is to be Examined, but not refused, tho' found *inhabilis*, and this because he was in Orders, and he could not be Presented unless in Orders, and yet tho' in Orders, if he be Presented, he must be Examined, but to what purpose, passeth all understanding, if his Priesthood or Orders presumes him to be qualified! 'Tis likewise to suppose Learning and Ability to be an inseparable quality; That an ordinary Scholar can never become less so. By the Old Law, the Bishop had two Months time to Examine, 2 Roll's Abr. 354. by Hob. 317. He hath a convenient time, and by Can. 1 Jac. 1 cap. 95. the two Months is reduced to 28 Days: And the Ordinary both in Conscience and by the Obligations which his very Order doth import, is obliged to Judge for himself as well as to Examine; the contrary is repugnant to his Office of a Judge, to be forced or compelled to institute every Presentee, fit or unfit: Besides the Ordinary *pro Tempore* hath the particular care of all the Diocess, and during a vacancy, is to take care of supplying every particular Cure within his District; then when he admits and institutes, the very form of Words, is, *Accipe curam meam & tuam*, which renders it more Absurd, that *nolens volens*, he must transfer his Cure to a Man not able in his Judgment to execute it.

'Tis against the Rule of Law, for that the Words of it are express, *articuli Cleri, cap. 13.* and this Cooke declares to be Affirmative of the Common-Law; *Item petitur quod persona Ecclesiasti quas Dominus Rex ad beneficia presentet Ecclesiastica si Episcopus eas non Admittat ut puta propter defectum Scientie, vel aliam causam rationabilem, non Subeant examinationem Laicar' personar' in casibus antedictis prout his temporibus attentetur de facto, contra Canonice sanctiones, sed adeant Judicem Ecclesiasticum ad quem de jure pertinet pro Remedio prout justum fuerit consequendo respons' de Idonietate persone presentate ad beneficium Ecclesiasticum pertinet Examinatio ad Judicem Ecclesiasticum & ita est hactenus usitatum & fiat in futurum.*

Here is *Idoneitas persone presentate*; and the words of the Writ, are *quod permittat presentare Idoneam personam*. And if the Presentee were not a fit person, no such Writ can be maintained.

Then

Then my Lord Coke in his Comment upon that Statute in 2 Inst. 631, 632. saith, that there may be diverse Exceptions to Persons presented as Bastardy, Villenage, Outlawry, Excommunication, Laity, Under-age, or Criminal and Lewd in his Conversation, or inability to discharge his Pastoral duty, as if he be Unlearned; and the Examination of the Ability and Sufficiency of the Person presented, belongs to the Bishop, who is the Ecclesiastical Judge, and not a Minister, and may and ought to refuse the Person presented; if he be not *Idonea persona*: And if the cause of refusal, be default of Learning, Heresie or the like, belonging to the knowledge of the Ecclesiastical Law; then he must give notice to the Patron, so that default of Learning, is by him (who was no great friend to the Jurisdiction of Court Christian) agreed to be Subject to the Ecclesiastical inquiry, and then in Pleading, he must show the cause of refusal, and the Party may deny the same, and then the Court shall write to the Metropolitan, or to the Guardian of the Spiritualities, *sede vacante*, to certifie if the cause be thus; and his Certificate is conclusive; if the Presentee be Dead, it shall be tried by a Jury, 15 Hen. 7. 7. the Bishop is declared to be a Judge, and not a Minister in this case of Examining a Man's Ability; he is a Judge in this case as he is in case of a Resignation; for an Ordinary may refuse it, and without his acceptance, 'tis no Resignation, and must be so Pleased, Noy. 147. Bro. tit. Bar. 81. & 2. Cro. 197. and so agreed, even in the Case of *Leach and Thompson*, in Reg. 53. is a Consultation upon this very surmise that inability, *ad Retinend' beneficium propter Crimina*, belongs to Court Christian; and that the Ordinary is Judge thereof, which is much stronger than our case, because there was a Freehold vested by induction. || But this hath been agreed by that Court from whose Judgment the present Appeal is, that a refusal may be upon insufficiency, appearing upon an Examination, upon a new Presentation; and constant practise proves it.

The greater if any doubt is upon the Plea, if good, it says, that he was Examined, and upon Examination, was found incapable.

The Exception taken to it, is, that it doth not set forth the particular parts of Learning, in which he is deficient; that the Temporal Court may Judge, if it were a sufficient cause of refusal, which is to change and turn it, *ad aliud examen*, what Learning is requisite for a Presentee to be Benefic'd; they would not have the Ordinary to determine what Qualifications a person ought to have in order to take a Benefice, but the Judges in *Westminster-Hall*: They can have no colour for this pretence, but that the Ordinary may have refused, when competently Learned in their Opinions, and they cannot say that the Law hath settled any Rules or measures of Learning requisite. Some say, Latin is not requisite since the Liturgy is now in English, and therefore they would Judge of it; others say, the less Learning the better Preacher, if can Read, and Pray, and Preach, and be indued with Spiritual Gifts,

and so is their Replication; others say, that the Ordinary's Judgment must be submitted to the Judge's Opinion of the proportion of Knowledge necessary; then they have a Popular pretence, that this will give the Bishops too great a Power of refusal, and so restrain Patrons from their privilege of Presenting, and thereby make themselves Collators: But, there's no danger of that, because there must be notice and a convenient time for another Presentation, and the danger of this restraint, is as much the other way, for then the Temporal Courts are to do it, and its much at one to the Patron, which is to declare the inability, the Ordinary or the Temporal Courts: On both sides, it must be agreed, that default of *Literature*, is a good and just cause of refusal, the Question is, who shall judge of it; it is said, *minus Sufficientes in Literatura & ea ratione inhabilis*, i. e. (it being indefinite) *in omni Literatura necessaria*.

But, they Cavil at the Word *minus sufficientes*, as if that agreed him somewhat Learned, and forget that 'tis said, *ac perinde incapax*: And *minus sufficientes* is in Lawyer's Latin, totally insufficient, and so 'tis used in all Demurrers to Declarations, Pleas, Replications; *quod Narr' vel placit' pred' & Materia in eodem content' minus sufficient' in Lege existunt ad quam vel quod*, the party, *necesse non habet nec per Legem terre Tenetur aliquo modo respondere*; i. e. 'tis good for nothing, 'tis insufficient; the Court in their Judgments upon the insufficiency of the Plea, do always say, *quia minus sufficient' existit*.

Then it was argued, That it is a good Plea to all intents and purposes, from the nature of the thing, and the impossibility of making it more particular and certain. 2. From the sufficiency of it to all intents and purposes of Trial. 3. From the Precedents and those of Antiquity which warrant this form of pleading. 4. From the mischiefs and inconveniencies which must follow and ensue, if a greater particularity were required.

1. From the nature of the thing, and the impossibility of making it more particular and certain; if the Bishop were bound to set down in particular, and at large, every point of Learning wherein this poor wretch was and is deficient, 'twould be a Pleading like to a justification of an Action done by a private Person, and not like to the Pleading of the Act of a Judge, which this is; 'twould be so large as to render it impossible for to joyn an Issue thereupon; and then they would have demurred with a Cause, because *multiplex duplex incentrum & perplex'*, and the rest of our usual *objectiones* upon those occasions; the Assignment of several and many particulars would have been double, and good cause of Exception, because one particular might be found true and another not, and the Assignment of one particular would have been adjudged insufficient, for then they would have said that Learning is of a Complex nature, and if a Man should fall in answering any one particular, tho' common Question, yet he might be qualified in general: And therefore the Assignment of one

one defect, tho' never so gross, shall not make a Clerk, *minime capax*, and therefore no good Plea: For, if a particular be Assigned, that would not prove a general Defect of knowledge, according to the words of the Law; which is the only thing that could make him incapable, *ad habend' beneficium cum Curia Animar'* and therefore the Bishop as a Judge, returns him *in literatura insufficientis & ea de causa minime capax*, and the special instances would have been Evidences upon a new Tryal, or Examination before the Arch-Bishop.

Now this cause of refusal, distinguishes the case from all others, that they can insist upon; all other inabilities of a Clerk depend upon one single point, as Bastardy, Villenage, Outlawry, Excommunication, Lay-man, Under-age, or Ecclesiastical Infancy: So all Crimes must have their foundation from a particular Act, as Adultery, Perjury, Simony, &c. In these it shall not be enough to Plead that he was *inhabilis* generally, or *criminosus*, generally & *ideo inhabilis*, because no body can be *criminosus*, but he that hath done some particular Crime, and that is to have a several Tryal according to its respective nature; if it be an Ecclesiastical Offence, then there is a particular method of Tryal; if a Temporal, then another, and so says Coke, 2 Inst. 632. and therefore a particularity is required there, but here is all tryable by the same way, *viz.* a new Examination before the Arch-Bishop: Here the matter it self admits of no greater certainty; for that is a general deficiency of Learning only, which can make an incapacity of discharging the Pastoral Office; it is a matter that must appear by a variety of Questions, and cannot be proved by any one single instance whatsoever.

This is the true reason and difference why in several Cases general Pleading hath been denied, and why in this Case it hath been always used, and never excepted against.

Then it was argued, That this Plea was sufficient to all the intents and purposes of Tryal and Determination.

By our Law that Plea is sufficiently certain, which may be Tried without inveigling either Court or Jury, that is, it must be intelligible and plain; and this surely is plain enough, the Ordinary had a Power to refuse him, for want of Learning, sufficient to enable him to discharge his Pastoral Office; he Pleads that he was *minus sufficiens in Literatura*; this is to be tried by the Certificate of the Arch-Bishop, or the Guardian of the Spiritualities, during a vacancy and that is evident, by 39 Edw. 3. 1, 2, 40 Edw. 3. 25, and from Spaccot's Case, 5 Rep. 7.

There never was an Objection made to the uncertainty of any Plea, if the Matter could be fairly reduced to an Issue for a Trial; now here the Court might certainly have written to the Arch-bishop to have known *utrum* this Creature, were *minus sufficiens in Literatura & ea Ratione inhabilis*, and the *actus Curie* of the Bishop would have been Evidence before his Grace, and he might have certified

certified that he was, or that he was not sufficiently Learned: No, say they, the Court must not write to the Archbishop to know that, till it be said in what Points of Learning he was defective; and if these shall be thought material Parts of Learning for a Rector, then they must write to know if *Hodder* had them or not; but if they think them not material for the Qualifications of a Pastor, they must not write at all: This is the true English of the Argument. But it was argued, That the Temporal Court is only to judge, that the Cause of Refusal, if true, was a sufficient Cause; and the Books are, that a general default of Learning is a good Cause; and this the Archbishop is to try: And this is certain enough for to make an Issue or Question proper for that Trial.

Besides, A greater Latitude and Generality hath of late been allowed in pleading of Proceedings in Courts, and before Judges, then formerly. In ancient days, if a Man pleaded a Judgment in a Court in *Westminster-hall*, they set forth the whole; then they came to allow of a *taliter fuit processum*, and an Abridgment of the Proceedings; then came a *Receperavit* only: And this was because that all Proceedings in the Superiour Courts were to be presumed regular, till the contrary were shewn: But this was denied a long while to Inferiour Courts, because these were tied to stricter forms, and therefore were still forced to set forth the whole; then they allowed a *taliter fuit processum* for them, provided still they were Courts of Record: But now they allow it in pleading of a Justification upon a Recovery in an Hundred Court, because the whole must be given in Evidence; so that such a formal Nicety in Pleading is not generally required now as was formerly. Besides, In Matters triable by the Spiritual Law, there is always less particularity required in Pleading, then in others triable in Courts Temporal, as in Bastardy, Divorce, Deposition, Literature, Profession, and the like: It's enough if so much be alledged, that they may write to know whether the Fact be so or no; and upon a Return thereof that 'tis so, they can give Judgment. Now if his Grace my Lord Archbishop, in this Case, upon Examination had returned that this Presentee was in *Literatura minus sufficiens*, as undoubtedly he would, (and so the Plaintiff thought, otherwise he would have joyned Issue) and so *ea occasione inhabilis*, then unquestionably Judgment must have been for the Plaintiff in Error; for default of Learning is a good cause of Refusal, and must be agreed to be so. The Rule laid down by my Lord *Anderson*, 3 *Leon.* 200. is, That in Matters triable by our Law, all things issuable ought to be specially alledged, in order to have a convenient Trial; but in Matters Spiritual the Law is otherwise, because there's no peril in the Trial; and therefore if certain enough to ground a Certificate, it's sufficient.

My

My Lord *Hob.* 296. in *Slade and Drake's Case*, saith, That in pleading a Divorce, you must shew before whom it was, 11 *Hen.* 7. 27. but you need not shew all the Proceedings as you should of a Recovery at Common Law; and the Reason why you must shew before whom, is only that it may be known, who is to try and certifie it. In *Burdell's Case* 18 *Edw.* 4. 29, 30. 'tis clear that in all Spiritual Acts triable by the Spiritual Law, it is necessary to plead no more than what may give the Court ground to write to the proper Ecclesiastical Officer, and to judge by his Certificate. Now here is ground enough in this Case for the Archbishop to examine this ignorant Person, for so he must be taken to be; for so he is found by one Ordinary, and he refuses to be examined by the Archbishop: he is pleaded not to have Learning enough to capacitate him for a Cure of Souls, and that by one whom the Law hath constituted his Judge: 'Tis true, this is traversable and triable by the Archbishop, but all those Instances of his Insufficiency that were taken in the Bishops Court, would be Evidences of the same before the Archbishop, proceeding in an Ecclesiastical manner, tho' not so proper, tho' not possible to be set forth in the Temporal Court; this is not a General Return of a Person *inhabilis*, which might occasion an Enquiry into all sort of Disabilities; but a Special Plea of *inhabilis, quia insufficienter Literatus*; and therefore no further Enquiry is necessary, then into the Learning of the Party, as Capacitates him for a Rector.

It was in the third place argued from the Presidents of Pleading in this Case, and other Cases of Pleading upon like Occasions, and those both Ancient and Modern.

40 *Edw.* 3. 25. In a *Quare Impedit* (as this is) the Bishop pleads as here, That he Examined the Clerk presented, and found upon Examination *que il ne fuit sufficiens* Letter'd, and thereupon alledges Notice to the Patron, & *per lapsum temporis*, he justifies his own Presentation: Upon this, there's no dispute but that thus far it was well pleaded; but the only doubt was, whether the words, *and so disabled*, should be added to the Issue? and they were ordered to be part of the Issue in that Case, and so they ought to be in this Case, and so they are & *ex ratione inhabilis*; this Case is exactly parallel to that in question; and upon this Plea there was Issue joyned, and the Trial was directed to be by the Guardian of the Spiritualities, *vacante Sede Cantuariensi*, nothing can be offered against this, only that 'tis Ancient, and the Law is changed, but by what Authority is hard to know; there is no Act of the Legislature to alter it: much hath been done to help against Niceties in Pleading; nothing to require more. And *Bro. Quare Impedit* 168. they were compelled to joyn Issue, able or not able, in that respect.

39 *Edw.* 3. 1 & 2. The Earl of *Arundel versus the Bishop of Chester*, says the Book, tho' it appears plainly to be a mis-print, from the name of the Church, and the Trial *per pais*, and the Antiquity of the Bishoprick it self, it must be the same, that in the *Abridgements* called

called the Earl of *Arundel versus* the Bishop of *Exeter*, the Bishop pleads as here, That he examined the Clerk presented, and found him *persona inhabilis*, to have a Benefice in the Church; and Issue is joyned upon that which is stronger then ours, and a Trial by Jury is directed out of the County of *Cornwall*, because the Clerk was dead. Here are two Cases in which all the different Trials are taken that can be had by the Guardian where the Presentee was living, and by Jury when dead, because he could not be examined: And in both these Cases Issue is taken upon this Plea, and that in great Cases, and after long Debate. And, according to the Lord *Coke*, in this Reign the Law was pure and uncorrupt, and flourished.

Then were urged Modern Precedents, *Mich. 15 & 16 Eliz. Rot. 1941. Molineux versus Archiepiscopus Ebor'* in a *Quare Impedit*, in which the Plea of the Archbishop is the same *in totidem verbis*, as here, *Persona in Literatura minus sufficiens, seu habilis ad habend' præd' Ecclesiam*, and there is no Exception taken to the Plea, but only Issue joyned upon notice, or no notice, before the Lord Chief Justice *Dyer*.

Another Precedent there is *Hill. 6 Eliz. Rot. 646. Bodenham versus Episcopus Hereford'*, there is the same Plea in Bar as here, That the Person presented was *Persona in Literatura minus sufficiens seu habilis ad habend' aliquod Beneficium Sanctæ Ecclesiæ*, and then avers notice to the Patron: and no Exception taken to the Plea, but Issue upon notice.

Pasch. 6 Eliz. Rot. 714. Paschall versus Episcopus Lond' Quare Impedit, the Ordinary pleads an Examination *de habilitate, honestate & doctrina ejus; & pro eo quod idem Episcopus invenit præd' Christophorum fore criminosum, & de non sana Doctrina ideo recusavit* and notice; and even to that general Plea there's no Demurrer, but Issue upon notice. 'Tis no Answer, that here was no Solemn Judgment upon this very Point, for it doth rather enforce the Authority of the Precedents; it argues that the Law was taken to be so clear for the validity of this Plea, that no Lawyer would venture upon a Demurrer, but rather would trust to a Jury upon the Evidence of notice, it argues it so constant a Course and Method of Pleading in these Cases, that none was so hardy as to dispute it.

38 Edw. 3. 2. Perjurum was alledged by the Bishop in the Presentee, and held to be well enough, but nothing of manner, time and place, nor any Conviction of it mentioned, and yet this was admitted a good Plea, *2 Rolls Abridg. Presentment 356.* and so says *Rolls*, it shall be, tho' in a Suit between the Ordinary himself and another, *Dyer 293.* 'tis cited *Bro. Quare Impedit 170. Justice Rhodes 3 Leon. 100.* vouched a Case in *30 Edw. 1.* out of a Manuscript of the Lord *Catkins*, wherein upon a *Quare non Admissit*, the Defendant pleaded that the Presentee was *Schismaticus & Adulter*, and the Court commanded that he should hold to one or other of them, for which he said *Adulter*; from hence 'tis manifest, that the Court did not dislike the Plea for the generality, but the doubleness.

†

And

And then it was said, That after all these Presidents on this side, and many others which might be Cited of the like generality in other cases, 'twill be difficult to shew one single Instance or Case in which this matter of general defect of Learning was ever pleaded otherwise, or any one Judgment against any Bishop whatever, upon such a Plea; for tho' in some Cases, which they say are parallel and similar, tho' in truth they are not, as *Criminatus* and *Schismaticus* hath been adjudged too general, yet this Plea of *Minime the Literatura sufficiens ac ea ratione incapax*, as it has always been used, without alteration of words, so has it never yet been excepted against, and in these Presidents of *Edm. 3.* before cited, hath been thought good, and Issue joyned thereupon.

This was the ancient form of Pleading, and (as all those ancient Pleas were) founded upon Reason, being such as the Subject Matter is capable of.

In the Case of a Coroner it's a good Cause to remove him, *quia fuit minime idoneus ad exequendum officium istud*, and no charge of any particular insufficiency assigned. *Fitzb. Nat. Brev. 163.* and there is no question but that 'twould be a good Cause, and sufficiently certain, in a *Scire Factos* to repeal, vacate, or cancel Letters Patents for an Office in the Law, to say *in Legibus hujus Regni Angliæ minus sufficienter instructus*, without assigning any particular Case or Statute that a Man blundered at, or was ignorant in. Suppose an Office in the Law, to which the King or a private Person hath the Nomination, and the Court refuses to admit a Man so named, and an Action brought for that Refusal, &c. would it not be a good Plea to say the Party was *minus sufficiens in Scientia Legum & ea Ratione inhabilis*; and particular Instances are Evidences.

This is in the Negative, like a *non fuit dampnificatus*, and there you never need to shew how; unless 'twere a particular Incumbrance at the time of the Contract; otherwise 'tis always a good Plea.

In *Non Compos* 'tis never shewn in particular wherein, or what Feats of Frenzy; *Non compos* implies that he had a general Defect, disabling him at that time to do an Act obligatory and valid; and that resembles this; for you need not shew wherein; but the Particulars are Evidences.

The Reason of the thing proves the Convenience and Solidity of the distinction between Pleading a Negative and Affirmative: For instance in this Case, the Negative pleaded implies an entire denial of sufficient Learning to qualify him for a Cure of Souls, and that justifies the Ordinary; and our Law Books are full of this Distinction; Mode and other Circumstances of Quality, Time, and Place, are requisite in Affirmative Pleas, none of which are necessary in Negatives. There might be cited infinite numbers of Cases to that purpose, as *Manser's Case 9 Rep. 4.* *Broughton's Case 5 Rep. 24.* *Alston and Hill 3 Cro. 153.* *Hutchinson versus Lonsford, 3 Cro. 393.* *Wild and Dowse, Latch. 159.* And as the Foundation

of all those, is the 40 *Edm.* 3. 30. which is the ground of all these, and many more subsequent Authorities to the like effect: But besides, there's one modern Case, 'tis *Church versus Brunswick*, *Sid.* 334. Bond to pay from time to time a Moiety of all such Moneys as from time to time he should receive; and payment of a Moiety generally, without shewing the particulars in certain, was held a good Plea; and the reason of that Judgment maintains the Rule now contended for, which was, because 'tis of what he should receive from time to time; otherwise if those words had been omitted; because in that Case there would be a stuffing of the Rolls with a multiplicity of Particulars; and the same Reason holds in the Case at Bar.

Then 'tis considerable, and deserving of a Thought, That if Learning be requisite to an Office Temporal, for a Slander in which an Action lies, there these very words would bear an Action: As to say of a Judge, or the like, the very words here mentioned, with reference to his Office, 'twould be deemed Scandalous and Actionable: Now our Law will not allow uncertain, doubtful, and ambiguous words to be so.

Even in Affirmatives our Law allows of general Pleading, where Particulars would be many: As in Bond for performance of Covenants upon an Apprentices Indenture for finding him Meat, Drink, Washing, Lodging, and other Necessaries, held that *invenit* Meat, Drink, Washing, Lodging, & *alias res necessarias*, is a good Plea, tho' intirely uncertain what or how much; and the Reason is not only, because 'tis in the words of the Covenant, for that Reason doth not always hold, for many times you must shew how, and are forced to vary from the words of the Covenant in the Breach; as in case of quiet Enjoyment, Breach must alledge how and by whom, and under what Title the Man was disturbed; but there's another Reason, because the Particulars would be many.

Cryps versus Sir Henry Baynton, 3 *Bulstrode* 31. Case *sur assumpsit*, That J. S. being a Friend of the Defendants, and coming to the Plaintiffs House, he fell sick; the Defendant, in consideration that the Plaintiff would provide for him such Necessaries as he should want, he would *bene & fideliter solvere proinde*: The Plaintiff shews that he lay there two Months; that the Plaintiff provided him Necessaries amounting in value to, &c. and held good without shewing the Particulars to avoid a multiplicity of Reckonings; so 'tis for a Surgeons or Apothecary's Cure.

Another Rule in Pleading there is, That a Certainty, or a Generality in Pleading shall be required, according to the nature of the Subject Matter pleaded. In pleading of Breach of a Statute Law, it's enough to use the Negative of the words of such Statute, as it is in Case of a Covenant; and by the same reason in this Case, where a Statute says the Bishop may refuse *propter defectum Scientiæ*, it's enough to say *in Literatura minus sufficiens*, especially when 'tis added *ac perinde inhabilis*.

Then

Then were urged the Milchiefs and Inconveniences which must ensue and follow upon the Construction which they would make, that this Plea is uncertain; for their Reason only can be, as was said before, that the Court may judge if it be such a Deficiency of Learning as disables to hold a Curacy of Souls; and this is the Reason all their Cases go upon, and the Reason insisted upon below; i. e. in effect that they must try it, not the Archbishop. The same Pretence is applicable to any other defect, and 'twill in Consequence confound Jurisdictions; 'twill make an Enlargement of the Temporal, and Diminution of the Ecclesiastical Jurisdictions, tho' both are founded upon the same *English* Laws, and of equal Age and Authority: Nor is it any Answer which they have alledged against this, That the Judgment at Law is not that this *Hodder* shall have Institution, but that a Writ shall go to the Metropolitan to require him to admit a fit Person upon Mr. *Hele's* Presentation; and that if Mr. *Hodder* be presented, the Archbishop may refuse him as insufficient; and so the Archbishop is still Judge of the Sufficiency. This looks plausible: but they omit or forget the Consequence, that if this Judgment stand, then if the Archbishop refuse, the Temporal Courts must Judge upon another Writ. Whether the Cause of Refusal were in a point of Learning, which they think requisite, for he must not plead a general Defect of Learning, but mention Particulars, that they may judge of them; this is to subject even his Grace the Metropolitan to their Opinion, in an Affair within his own Jurisdiction and Consuance. It is at last to enforce the Episcopal Judges to contradict their own Opinions, and to admit Persons which they think not sufficiently Learned; tho' the first Judgment doth not directly place in *Hodder*, yet the next will, if the Archbishop prove of the same mind: Now this is apparently the Consequence, from the pretended Reason of the Judgment for them; and it is in effect to deny the old Law, that a defect of Learning is a sufficient Cause of Refusal; and that the Ordinary is Judge of that Defect, and not the Temporal Court.

And then as to the Cases objected *Dyer* 254. the Bishop of *Norwich's* Case in a *Quare Impedit*, which is likewise in *2 Rolls Abridg.* 355. where the Bishop pleads that the Presentee was a common haunter of Taverns and other Places, and Games unlawful, *ob quod & diversa alia Crimina consimilia præd*, the Presentee *fuit Criminosus & sic inhabilis & non idonea persona*, and this was held an ill Plea: But the Grounds and Reasons of that Judgment were not for the generality of the Plea, but because the defects specially declared before were not sufficient to make the Presentee *& sic Criminosus*, as being not *Mala in se*, but *prohibita* by particular Laws under certain Penalties. Nay, the Argument they would make from the general word *Criminosus*, will not hold in the Case in question, but is clearly distinguishable from it; because one single Act, one Crime specially set forth, would disable the Man; but in this case Ignorance, that works a Disability, must not be of any one particular thing whatsoever, but a

general defect of Knowledge. And another Reason against their Inference from these and the like Cases, is this, they belong to a different Examen, and upon that they require (as was said before) a different pleading.

The great Case, and the only one that can be pretended to come near this, is *Speccot's Case*, mentioned in every contemporary Report of that Age, as a new Case; and a new one it is; and the Reasons of it are differently reported in divers Books; and in truth, the Reasons of the Judgment do not warrant it, nor make it applicable to the Case at Bar.

The Authority of it is questionable, for they agree, Schism or Heresie, which the Judges there take to be all one, a Cause of Refusal; and others said, they did not know what was *Schismaticus inveteratus*; but they did not consider that the Archbishop might, tho' they did not; but perhaps the Ordinary may judge that to be Schism which is not: and therefore the Temporal Courts are to judge what is Schism; and in the enforcing of this Case below, they said the Ordinary is Judge only of Matters of Fact, not if the Fact be Schism; which is somewhat strange.

The Reports of that Case are 5 Rep. 57. 1 Anderson 189, 190. Gold. 36, and 52. and 3 Leon. 198, 199, and 300. In that Case the Bishop pleaded that the Presentee was *Schismaticus inveteratus* & ideo non habilis: upon the validity of this Plea there were divers Arguments; Two of the Judges, says my Lord Anderson, were for the Plaintiff, and two for the Defendant; and for the Decision of the Matter, the Opinion of the other was asked, and by the greater Opinion Judgment was given *pro Quer.*

Then were repeated my Lord Anderson's words, fol. 189. the Instances that were urged, were, says he, *Criminosus & Perjurus*, but they are Matters triable both by Law, Spiritual and Temporal, and the *Cement*, or how is necessary to be shewn to determine the Trial; but *Schismaticus* in the principal Cause shall be tried only by the Spiritual Court, and not by the Temporal, as that of an Heretick may be generally pleaded: And divers Cases were put to prove General Pleas and Issues triable at Common Law, and yet says he, Judged *pro Quer.*

This is my Lord Anderson's Opinion of that Case, and whether the Ancient Authorities vouched in that Case, do warrant that Judgment, must be submitted.

Besides, by our Law 'tis not any one Opinion, tho' judicially delivered, that can make or alter the Law, nay, it doth not oblige any farther than the reason of it is considerable, and agrees with the constitution and the Rules of Law; my Lord Vaughan always declared in favour of Reason and Authority, and that in Honour of our Law, for the contrary is to say, 'tis founded upon no Reason; then 'twas urged, that this Judgment was when the Courts below were in struggle with the Ecclesiastical, and the then High Commission Courts Erected by a Eliz. had given some provocation; which, with frequent Prohibitions, gave occasions to the Disputes between the Bishops and the Judges, in the beginning

ginning of the Reign of K. Jac. 1. But admitting the Case to be Law, the same is easily distinguishable from this, and founded upon different Reasons which cannot govern or influence this.

'Twas urged first in that Case there was some possibility for the Bishop to have set out the Heresie certainly and particularly, for all Heresie must be founded upon some particular Tenet, that is Repugnant to the common received and Orthodox Doctrine. Now in this Case, say they, the Heresie ought to be Assigned, that the party may Traverse it, and purge himself, and the Arch-Bishop not to be inveighed and obliged to run over all the species of Heresie, which, say they, may be almost impossible, but may have only one particular Opinion to Examine, whether the Presentee did obstinately maintain it, for if the Temporal Court had been of Opinion, that such Tenet in particular was not Heresie, tho' the Ordinary thought it so, yet then they would have over-ruled the Plea, and not have wrote to the Arch-Bishop at all: This is the sole cause of that Judgment, and then the consequence will be as was observed before. But their own reason fails in this Case, for here the sufficiency of Learning is Traversable; for as hath been shewn it hath often been Traversed, and as to the *ea Ratione inhabilis*, no Objection can be to that, for the old Authorities Cited do warrant, nay, require it; and all Pleas of Special *non est factus* as by breaking of a Seal, and the like are in the same manner.

Then besides the very words of the Law of *Articuli Cleri*, are very much worthy of consideration; it impowers the Bishop to refuse a Clerk, *propter defectum scientie & alias Causas rationabiles*, now all these Causes of Refusal, mentioned in their cases, comes under the *causas Rationabiles*, and *causa vaga & incerta est non Rationabilis*, now want of Learning is not included by intendment, but by expresse words, and therefore need not otherwise be set forth; take it for granted, that as they would have it, the Temporal Judges are to Judge what is a reasonable cause of Refusal; yet they are not to Judge, if defect of Learning be a cause or not, for in that the Statute is positive; then if said to be deficient in Learning, & *ea ratione inhabilis*, they had nothing to Judge upon, they were only to write to the Arch-Bishop to know if the Fact were true, if he were deficient, and therefore it need not be set forth any otherwise, then as the Statute expresses it; tho' in that case, they say, there are divers sorts of Schisms and Heresies in Doctrines on which the Bishop might warrant his Refusal, yet 'tis not so much as once pretended, there are any Opinions delivered in those cases, that deficiency of Learning is subject to the same Rules of Pleading.

Then the Plea is in the Negative, as was shewed before, which is more than enough to make a good difference; and Negatives in a Bar are always allowed to be more general because most favoured, and especially here, where the matter and person to which the words are applied, do sufficiently restrain and determine the seeming uncertainty of it.

Nothing

Nothing can be pretended to reduce this to a greater certainty, but the Canons or the Statute of 13 *Eliz.* cap. 12. or other Laws of the same nature, 1 Canons of King *Jac.* 1. made in 1602. and they were made pursuant to Canons made, 1562. by which, no Man was to be admitted, *nisi rationem fidei juxta Articulos Religionis in Synodo Episcoporum & Cleri Anno, 1562. approbato Latine reddere & eandem Scriptura testimonio Corroborare possit Can. 3, 4 Conditiones in ordinandis requisiti*, this is merely a Negative injunction on the Bishop never to confer Orders upon any Man that cannot do this, it is not mandatory upon him to ordain every Man that can do this, nor does it any way lessen or diminish the Authority or Judgment of the Ordinary in Examination of the fitness and Learning requisite.

So is the Statute of 13 *Eliz.* the same induces an incapacity on those that shall not subscribe the Articles, but it leaves all things else to the Ecclesiastical Law; neither the Canon nor the Statute are Derogatory from the Old Ecclesiastical Law, they both leave it *in statu quo* to the Ecclesiastical Judges; no Man will pretend that these are a Repeal of the Statute of *Articuli Cleri*; so that the Law remained as it did with more Latitude indeed to the Bishop, but not with more favour to the Clerk.

They objected, that here was not convenient notice to the Patron, and the usual pleading of it is the same day.

But surely that's well enough, and so was it held by all the Judges that favoured their side in this case, and 'tis apparent, that he had above four Months time to have presented another, besides, the Judges declared below, that if not a convenient time, it ought to have come on their side, but they admit notice by their Replication, and insist upon his Orders as an Estoppel to say that he was Illiterate.

They pretend, That he is still under the Bishop's Jurisdiction, and that he may deprive him for the same Cause, if sufficient, after Institution, but that's a great mistake; for, there may be a cause of Refusal, which is not of Deprivation, for, he may become Learned that was not so, and besides, the Rule is false, after induction, they would then be discoursing about Freehold, &c. a Man may be refused, because *non compos*, but he cannot be deprived for that Cause, though the Bishop may provide a Curate, &c.

As to the pretence of six Months notice, from the time of the Refusal, 'twas never insisted on at the Bar in *C. B.* or *B. R.* and the Judge who doubted, did only say, he was not fully satisfied with the current Opinion of the Books; his doubt arose upon this, That the cause of Refusal was not within the Patron's knowledge. Suppose the Man had not Episcopal Orders, but pretended to them, and the Patron knew nothing of the matter, should this Presentation prevent lapse, and the rest were all of another Opinion and the Books are full to this effect, for the Patron ought to present a Man qualified, otherwise 'tis as no Presentation, and then lapse in course. Suppose he had presented a mere *laicus*, 'tis

as none; suppose he had presented a Woman, as *idonea persona*, 'tis as none; and these instances may seem Trivial, but our Books do mention them.

2 Roll's Abridg. 364. Kelway 49. 59. 34 Hen. 7. 21. 14 Hen. 7. 21. and Dyer 227. and Sir Symon Degges Parson's Counselor.

Upon the whole, the Question is, whether a Court of Law shall Repeal the Statute of *Articuli Cleri*, whether the Plea shall be adjudged ill, which is in the very words of that Statute; when the same Fact was never pleaded otherwise, nay, when it hath been pleaded thus often times, and never excepted against till now.

Wherefore it was prayed that the Judgment might be Reversed.

On the other side 'twas argued, That the Bishop's Plea below, was too general, and the Plaintiffs Replication good; that his being Ordained a Priest, and a Licensed Preacher is enough, that this is an Answer to the Allegation of the *Minus Literatus*, his being a Priest is a kind of a supersedeas to his Examination, that there was no Learning requisite to his having a Cure of Souls, which was not Antecedently necessary to his receiving of Orders: That he ought not to be admitted into Orders, unless he be assured of or named to some Curacy, all which, supposes the Qualifications Requisite for a Benefice with Cure of Souls; then 'twas urged, that here was not notice sufficient, for 'tis not till many days after the Refusal, for this might have put Hele the Patron beyond the possibility of making a new Presentation: And in all pleadings of this sort, the notice is generally alledged to be the same day, or within a day or two at the most; That certainly it ought to be with convenient notice. But then it was urged, That the six Months ought not to be from the Death of the last Incumbent; if there be a person Criminal presented, which the Patron doth or may know, as well as the Bishop, there the six Months must be from the Death; but if it be upon a refusal for a Cause which lies only in the Bishop's knowledge, then it must be only from the notice, and that notice ought to be personal; but if the Months incur from the Death, the notice should be in convenient time, and what that is, the Court must Judge.

Then it was urged from *Spevco's Case*, That this Plea is too general and uncertain, that a Temporal right being concerned, the Bishop ought to have set forth more particularly and distinctly the cause of his Refusal, 8 Rep. 68. the certain cause of a Divorse must be shewn, 11 Hen. 7. 27. 2 Leon. 169. The Ordinary is a Judge only of the matter of Fact, if true, not if this matter pretended be a cause of Refusal, he ought to alledge that so particularly, as to manifest it to the Court, in which the Suit depends; That 'tis a legal cause of Refusal. He is not a Judge, whether *Hodder's* insufficiency in any one point of Learning be a good

good cause of Refusal; for, if it should be so, the Temporal Right of Patronage would be very precarious. The Court ought to have enough before them, whereon to Judge of the Cause, as well as that on Issue may be joyned and tried; here 'tis only said that he is less sufficient, not that he is altogether illiterate; this will put it in the Power of the Ordinary to refuse for want of knowledge in any Learning as he thinks fit, as Mathematicks or Anatomy, without which, a Man may be well Qualified to be the Rector of a Benefice, and the consequence of such Opinion will be much to the prejudice of Lay Patrons; that certainty in Pleading ought to be encouraged for the prevention of the exercise of Arbitrary discretionary Power, that the Wisdom of the Common-Law is to reduce things to single Questions, that the Determination upon them may be plain, and certain, and known, and the reasons of such Determinations may appear, which cannot well be done, if general Allegations or Pleadings be countenanced, for which, and other Reasons urged by the Counsel, who argued with the Judgment, 'twas prayed that the Judgment might be affirmed.

It was replied on behalf of the Plaintiff, in the Writ of Error, that the Books were very plain, that the six Months were to incur from the Death of the Incumbent, and then, if there were not notice in convenient and due time, in order to enable the Patron to present again, that this ought to come on the other side.

That to require Learning in Presentees to Benefices, would promote the Honour of the Church, nay, of the Nation in general. That every Man who knew this Presentee and his Ignorance, even as to the Latin Tongue, must acknowledge, that the Reverend Prelate who refused him, had done, worthily, and becoming the Character of his Order, Family, and Person, and therefore 'twas prayed that the Judgment should be Reversed, and it was Reversed.

Robert Davis

versus

Dr. John Speed.

WRIT of Error on a Judgment in Ejectment in the King's Bench, for certain Lands in Hamp-Shire; the Declaration was upon the Demise of Francis Cocker; The Verdict finds, that William Horne and Ann his Wife were seized of the Lands in Question, in their Demesne as of Fee in Right of the Wife, that they made and executed a Deed, Covenanting to Levy a Fine thereof, to the use of the Heirs of the said William Horne, lawfully begot-

ren and to be begotten on the Body of the said *Ann* his Wife, and for default of such Issue, then to the use of the right Heirs of the said *William Horne* forever, and a Fine was Levied accordingly to these uses; that *William* and *Ann* were seized, *prout Lex postulat*, that they had Issue, *William Horne* their Son, who Died without Issue in the Life of *William* and *Ann*, that she Died, and *William* the Father, and Husband Survived her, that then he Died without Issue, that the lessor of the Plaintiff is Sister and Heir of the said *William Horne*, that after his Death, she entred and was seized *prout Lex postulat*, that *Elizabeth*, *Joanna*, and others, were Co-heirs of the said *Ann*, that their Estate and Interest came by mean conveyances to the Defendant *Speed*; That he was seized *prout Lex postulat*, that the Lessor of the Plaintiff entered and Ousted the said *Speed*, and made the Demise in the Declaration, and that the Plaintiff entered and was Possessed, till the Defendant entered upon him, and Ousted him: And if it shall appear to the Court, that the Defendant's entry was lawful, they find the Defendant not Guilty, and if, &c. upon this special Verdict, Judgment was given in B. R. for the Defendant.

Aud now it was Argued on the behalf of the Plaintiff, in the Writ of Error, that this Judgment was Erroneous, and ought to be Reversed, for that these Lands belonged to the Heirs of the Husband by force of this Deed and Fine; that this was in the Case of an Use, which was to be construed as much according to the intent of the Parties as a will; That if by any construction, that intent could be fulfilled, it ought: That the intent of the parties here was plain to give this Estate to the Husband and his Heirs, that uses are to be governed by Equity, and that therefore the meaning of the persons concerned, was to be pursued; That the Woman intended to take nothing her self, nor to reserve any thing, but to part with the whole: That here was an use by implication in the Husband, tho' none could result back to the Husband, because he had none before; but that in this case as in that of a Will, an use might by implication very well be raised to the Husband, and then this might be good by way of Remainder, after the Death of the Husband; or create an Estate Tail in him, by coupling the use implied to him for Life, with that to the Heirs of his Body; and that if it were not so, then that it was good as a springing contingent use to the Heirs of the Body of the Husband, &c. and that in the mean time till that Contingency happened, the same was to the use of the Wife and her Heirs; And that this Construction contradicted no Rule of Law; That it was no more than was allowed in case of a Will, by way of Executory Devise, according to *Pell* and *Brown's Case*, in 2 *Cro.* that the Estate should remain in the Wife and her Heirs, during the Life of the Husband, that this was never designed to take effect as an use to be vested immediately, and it was no more then if the Deed had declared the use to be after the expiration

of twenty Years, or at other future time, to the Heirs of the Body of *William Horne*, and for default of such Issue, to his right Heirs, and that such time had happened, the use would have vested in the Heirs of his Body, or in his right Heirs, if he had Died before that time : That 'tis true, there must be a person capable of taking at the time when the Contingency happens, and so there was here, at the time of his Death ; That it could never be intended that the Heirs should take immediately, for that then there was no such person in being, there could be no Heirs during his Life : That this was like the Case of *Webb*, and Sir *Cesar Cranmer*, where the Trust of the Estate during the Life of the Duke of *Southampton*, was adjudged to remain in the Heirs of the Devisor ; the Duke himself not being capable to take it ; That here being no person able to take under this Deed and Fine during the Husband's Life, it shall be construed to remain as it was before, till that Life ends, and then the use ought to take effect : for otherwise, both the Deed and Fine are to no purpose, they are all in vain, and the intent of the parties to it is defeated. And there were Cited the Lord *Page's* Case, in 1 *Anderson*, and *Woodlett*, and *Denny*, 2 *Crook* 439. and 1 *Leon* 256.

On the other side, it was argued with the Judgment, that this Deed and Fine can raise no use, to the Heirs of the Husband, according to the Rules of Law. It was insisted, That if Husband and Wife do levy a fine of the Wife's Land, and no uses are declared, or such uses are declared, as are void and can never take effect ; such Fine is to the use of the Wife and her Heirs, that in such case the Estate remains as it was, or if the Fine Operates any thing it shall be for the benefit of the party to whom it did belong before.

Then it was urged, That this was designed to raise an use immediately to the Heirs of the, &c. and that there was no person capable of taking at the time of levying this Fine, the common Maxim in the Law proving it, *quod nemo est heres Viventis*; that the name and nature of an Heir import a successor after Death, that this being designed to raise an use, *ex presenti*, and no person being capable of taking at that time, the same must be void : That this is the case of a Deed, executed in the Life-time of the parties, and not a Will, where large allowances are often made in favour of supposed intentions, by reason that persons are often surprized by Sicknes, and presumed to want the assistance of Counsel, but the Rules of Law are always allowed to govern in Construction of Deeds. Then it was urged, that nothing was ever designed to the Husband himself by this ; that no words in the Deed can favour such a presumption, that this must either work as an Estate in present, or by way of remainder ; if the latter then by the known Rules of Law, there must be a particular Estate to support it, and such particular Estate must be either expressed, or implied ; here is none expressed, and if implied, it must be in the Wife, and if in her, then she dying before the Husband, her particular

particular Estate did determine before the remainder could take place, and consequently by all the Rules of Law, it can never take place; and no particular Estate can be implied, in or for the Husband, for that there is nothing said shewing such intent, and if the Construction of Law be to prevail, then as was urged before, that is in favour of the Wife. But here, it was plainly designed to take effect immediately, and therefore void, because there was no person in being, capable of taking at the time the Estate was intended to vest, and no uses are to be executed by the Statute, which are limited against the Rules of the Common-Law, *Cudleigh's Case*, 1 Rep. 129. if the limitation of an use be at this day to A. for Years, and afterwards to the use of the Heirs or Wife of B. which shall be, this is void, because 'twould have been void, if limited, in possession, *Dyer* 190. the Earl of Bedford's Case in *Popham*, 3, 4. and 82. resolved in like manner to be void, because would have been so in an Estate conveyed at Common-Law: And, all that can be objected, is, that then this is all void, which is no more than may be pretended upon every imperfect conveyance, but here the Case is in a Court of Law, and the Defendant is a Purchaser who hath been Thirty Years in Possession, tho' that doth not appear in the Case.

And it was said, That as to the Notion of a springing contingent use, 'tis hardly intelligible in it self, and by no means applicable to this Case, because here are no words in this Deed, that carry any relation to a future time or Contingency; and the Objection is only this, That the Conveyancer was mistaken in his Judgment, or that the parties knew not what they meant, or that they meant to create such an Estate; and in such a manner, as the Law will not allow; and neither of these are Reasons sufficient to prevail for the Reversing of a Judgment given according to the Rules of Law, by which Men's Inheritances have all along been governed, and upon which, many Estates do now depend.

'Twas further urged, That the contrary Opinion, which must be advanced to annul this Judgment, would render the Law and Men's Conveyances, as doubtful and uncertain as last Wills and Testaments, and submit Men's Titles to the Arbitrary Power and Will of those that shall Judge of them; It is to impower them to suppose intentions where not expressed, and to raise uses by Implication, where they were never designed: And in short, 'twill destroy all the difference between good and bad Conveyances, and enable Men to limit uses and raise Estates contrary to, and in different manner from what the Law hath hitherto allowed; it will render Purchases more uncertain than they are at present, and that's more than enough already, and the consequence must be to produce a confusion in property, &c. wherefore, upon the whole, it was prayed, That the Judgment might be affirmed, and it was affirmed accordingly.

Watts & al. versus Crooke.

Appeal from a Decree in *Chancery*: The Case in short was this; That *Peter Crooke* and *Elizabeth* his Wife, who was Sister of the half Blood to *George Watts*, claimed to have an equal share with *John Watts* and *Elizabeth Camfield*, who were Brother and Sister of the whole Blood to the Deceased, of his Personal Estate; and a Decree was made in *Chancery* in favour of *Crooke* and his Wife.

It was argued on behalf of the Appellants, That the half Blood ought to have but a half share: That in the Case of Inheritances, the whole Blood was preferred; and that, tho' such Rule could not govern intirely in this Case, yet it shewed which ought to have the preference; that the true Reason of Distribution was this, The Law was to give in like manner, as he might reasonably be supposed willing to have given his Estate, in case he had made a Will, and had not been surpris'd by a sudden Death; that every Man was supposed to favour his next of Kin; that the Statute of Distributions did the same thing; and then that the whole Blood was nearer of Kin, because did partake of both the Stocks from whence he came; that the Relation or Kindred in this Case intirely came from the Parents; that this was not an Alliance by his own Contract as Marriage, or the like; that the Inclination was supposed to arise to them from the Natural Love he bore to the Common Ancestors; that such Inclination could never be supposed equal, where the Party was only of the half Blood: And much to this effect, and many Arguments drawn from the Civil Law, were urged in favour of the Appellant, and several Presidents cited, where it had been judged since the Statute for the half Blood to have but a half share, by *Sir Richard Lloyd*.

On the other side it was argued, That the half Blood is as near a Kin to the Intestate, as the whole Blood, and ought to have an equal Share of the Personal Estate, with the whole Blood; that the Party must be presumed equally inclined to each Parent; that the Brother of the half Blood was as much a Brother as one of the whole; that the whole Blood was preferable in Descents, but that was only upon account of a Maxim in the Law; whereas here they are equally of Kin; the whole Blood is no more a Brother than the half; in the same Relation there can be no difference or degree; it might as well be pretended to have a difference allowed upon the account of Seniority; that Opinions and Practice had been with the Decrees; that this hath been taken to be the Law in *Westminster-hall*. Before the Statute, 'twas held that a Sister of the half Blood is in equal degree with the whole, *Brown versus Wood*, *Allen's Rep.* 36. and

and so cited in *Smith's Case*, *Mod. Rep.* 209. So in the Case of *Milborne and Milborne*, 30 March 1671. before the Lord Keeper *Bridgman*: *W. M.* had by Will devised all his Lands in Trust to pay every Brother and Sister he had living 40 *l. per Annum* each, and he had several Brothers and Sisters, both of the half and whole Blood; the Brothers of the whole Blood did oppose the payment of the 40 *l. per Annum* to those of the half Blood, but 'twas adjudged and decreed, that they are equally entituled to the 40 *l. per Annum* a piece, and enjoyed accordingly: *Farmer versus Lane and Nash* in Chancery, 26 Octob. 1677. declared and adjudged by the Lord Chancellor *Nottingham*, That the half Blood are in equal degree of Kindred with the whole Blood, and ought to have an equal Share of the Personal Estate. The like was in the Case of *Stapleton* and the Lord *Merion* against the Lord *Sherrard* and his Lady in Chancery by Judge *Windham*, 13 June 1683. the Case was thus, *Robert Stapleton* had a Sister of the whole Blood, and a Brother and Sister of the half Blood, and died Intestate: Administration was granted to his Wife the Lady *Sherrard*, who claimed a Moiety of the Personal Estate by the Custom of the Province of *York*, and a quarter of the other Moiety by force of the Act for Distribution of Intestates Estates, and adjudged that the Wife should have only one Moiety, and the other Moiety to be divided equally between the Brothers and Sisters both of the whole and half Blood. This Cause was Reheard the Seventh of May 1685. by the Lord *Gulford*, upon the Certificate of his Grace the Lord Archbishop, to whom it was referred to certify the Custom of the Province of *York*; who certified that the Wife shall have only a Moiety, and the other Moiety shall be divided amongst the next of Kindred, and adjudged that the half Blood shall have an equal Share with the whole, and so the former Decree was confirmed.

The same was adjudged by Mr. Justice *Charlton*, June 30. 1685. in the Case of *Pullen* and his Wife against *Serjeant*, in the Court of Chancery.

The like was, amongst other things, declar'd and decreed by the Lord *Jessy*, Febr. 19. 1686. in the Case of the late Lord *Winchelsea* against *Noruliff* and *Wentworth*; upon which Hearing were present and assisting the then Lord Chief Baron *Atkyns*, and Mr. Justice *Lutwich*; and so was it Nov. 20. 1686. between *Simpsons* and *Throgmorton* in Chancery.

It hath likewise been held so in the Ecclesiastical Court, and accordingly adjudged by Sir *Richard Raynes* upon Solemn Argument, by the most eminent Counsel, both of the Civil and Common Law, in the Case of *James Stacey*, Febr. 26. 1685. and in the Case of *George Hawles*, by the same Judge, upon June 1. 1687.

Then it was urged, That the Statute of *Jac. 2.* for reviving and continuance of several Acts of Parliament therein mentioned, proves this; for 'tis enacted, That if after the Death of the Father, any of his Children shall die intestate; without Wife or Children

dren, in the life time of the Mother, every Brother and Sister, and the Representatives of them, shall have an equal share; and that a Brother of the half Blood, is a Brother to the Intestate as well as a Brother of the whole Blood, and therefore ought to have a share, and an equal share with the rest. And upon consideration of all those Presidents, and there being no Practise against it, except that of Sir Richard Lloyd's, it was prayed that the Decree might be confirmed, and it was confirmed.

Lee Warner

Versus

William North.

Appeal from a Decree of the Lord Chancellor, which overruled the Exceptions taken by the Appellant, to a Decree made by Commissioners for Charitable Uses, concerning a Gift by Bishop Warner's Will; and the same was received, and the Parties ordered to answer. And each side being heard by their Counsel; the Decree was affirmed. *Vide* the Statutes concerning Charitable Uses and the Delegates; and query how they differ: And whether an Appeal doth not lye upon a Sentence by Delegates, as well as on a Decree of Chancery upon a Decree of Commissioners for Charitable Uses?

Briggs *versus* Clarke.

Writ of Error on a Judgment in B. R. affirmed in the Exchequer Chamber, upon a Verdict in Debt for the Escape of one Cook; and none appearing for the Plaintiff in the Writ of Error, the Judgment was affirmed with the increase of Forty pounds in Costs.

Vide the Case of Ellison and Warner, Mich. 18 Car. 2. B. R. 2 Keeble 91. Whether a Writ of Error lyes in Parliament after Judgment affirmed in the Exchequer Chamber? Or if that proceeding in the Exchequer Chamber doth not come in lieu of Error in Parliament, according to the Statute of Eliz.?

Wil-

William Bridgman & al.

Versus

Rowland Holt & al.

A Writ of Error and Petition in Parliament. The Case below was thus: *William Bridgman* brings an Affize for the Office of chief Clerk for inrolling of Pleas in the Court of *King's Bench*; and the Plaintiff declares that the Office of chief Clerk for inrolling of Pleas in the Court of *King's Bench*, was time out of mind granted and grantable by the Kings and Queens of this Realm; and that King *Charles* the Second, by Letters Patents under the Great Seal of *England*, Dated the Second of *June*, in the Five and twentieth Year of his Reign, (after a Recital that *Robert Henley* and *Samuel Wightwick* were duly admitted to this Office for their Lives) granted this Office (upon the Petition of *Elliott*) to *Silas Titus*, so soon as it should become void; and that *Wightwick* was dead, and *Titus* had surrendred his Patent, did, in consideration of Service done by the Earl of *Arlington*, grant this Office to the Plaintiff and his Heirs, for the Lives of the Earl of *Arlington*, Duke of *Grafton* and Dutchess of *Grafton*, and the longer liver of them, from and after the Death, Forfeiture, or Surrender of Sir *Robert Henley*, and that Sir *Robert Henley* was dead, and that thereupon the Plaintiff became seized, and was seized of the Office till the Defendants did disseize him, &c.

The Defendants pleaded that they did not wrong or disseize the Plaintiff.

Upon the Trial of this General Issue at the Bar of the *King's Bench*, before the three puisne Judges, the Chief Justice then sitting near the Defendant's Counsel upon a Chair uncovered, the Plaintiff gave in Evidence the Letters Patents of 2 *June*, 25 *Car. 2*. Then it was proposed by the Counsel for the Defendant, That they would prove their Allegation, that the Office was anciently granted by the Kings and Queens of *England*, as was declared; but no Evidence was given besides this Patent of *Car. 2*.

Then the Counsel for the Defendant waiving the just Exception which they might have taken to the Plaintiff's Grant as to him and his Heirs, which ought not to be of such an Office, for that by that means it might come to an Infant: They insisted upon the meer right of Granting the said Office, viz. that it was not grantable by the Crown, but was an Office belonging to the Chief Justice of the *King's Bench*, and grantable by him.

Then

Then to prove this, it was shewn, That this Officer is to Inroll Pleas between Party and Party only, and had nothing to do with any Pleas of the Crown or Criminal Matters; that all the Rolls and Records in this Office were in the Custody of the Chief Justice; that all the Writs to certify, or remove the Records in this Clerk's Office, are directed to the Chief Justice; and from the nature of the Employment, 'twas insisted, that in truth he was but the Chief Justices Clerk, and that consequently the same must be granted by the Chief Justice.

And for further proof, it was shewn by the Records of the Court, that for the space of Two hundred thirty five years past, this Office when void, had been granted by the Chief Justice, and enjoy'd accordingly under such Grants. In Trin. 36 Hen. 6. Rot. 26. inter placita Reg. Anno Dom. 1458. It is inrolled thus, Be it remembered, that the Tenth of July this Term, in the Court of our Lord the King at Westminster, came William Sond, chief Clerk of our Lord the King, for inrolling Pleas, before the King himself, in his proper Person; and in the same Court of his Free-will did surrender his said Office into the hands of Sir John Fortescue Kt. Chief Justice of that Court (to whom of right it doth belong to grant that Office to whomsoever he pleaseth, whensoever that Office shall be void, during the time that the said Sir John Fortescue shall be Chief Justice) and that Office doth resign and relinquish to the use of William Brome; and the said Chief Justice doth accept the said Surrender, and doth the same day grant the said Office to the said William Brome, who is presently admitted into the said Office for his Life, and sworn accordingly.

Mich. 1. Edw. 4. Rot. 41. Upon Brome's Surrender to Sir John Markham then Chief Justice, the Chief Justice grants it to Mr. Sonde, who is admitted for Life, and sworn.

Mich. 8 Edw. 4. Rot. 26. 1467. Upon the Surrender of William Sonde to the said Sir John Markham then Chief Justice, he grants it to Reginald Sonde, who is admitted and sworn.

Reginald Sonde enjoyed this Office till the time of Henry the Seventh, and then Bray came in, and was Clerk till the 13 H. 7. and then came in Roper.

Hill. 9 Hen. 8. Rot. 9. Anno 1518. Upon the Surrender of this place to Sir John Broune Chief Justice, by John Roper, the Chief Justice grants the Office to Sir John Roper and William Roper, who are admitted for their Lives and sworn.

Hill. 1 & 2 Edw. 6. Anno 1547. Upon the Surrender of William Roper (Sir John being then dead) to Sir Richard Lister then Chief Justice, he grants the Office to William Roper and Rute Heywood, and they are admitted and sworn.

Hill. 25 Eliz. 1573. Upon the Surrender of William Roper (Heywood being dead) to Sir Robert Catlin then Chief Justice, he granted this Office to John Roper and Thomas Roper for their Lives, and they are admitted and sworn.

Mich.

Mich. 14 Jac. 1 Rot. 21 Anno 1616. Upon the Surrender of *John Roper* (*Thomas* being dead) to *Sir Henry Mountague* then Chief Justice, he grants the Office to *Robert Heath* and *Robert Shute* for their Lives, who are admitted and sworn thereupon.

Hill. 18 Jac. 1. 1620. *Shute* being dead, upon *Sir Robert Heath's* Surrender to *Sir James Leigh* then Chief Justice, he grants the Office to *Sir Robert Heath* and *George Paul* for their Lives, and they are sworn and admitted in Court.

Mich. 5 Car. 1. Upon the Surrender of *Sir Robert Heath* and *Sir George Paul* to *Sir Nicholas Hyde* then Chief Justice, he grants it to *Robert Henley* and *Samuel Wightwick* for their Lives, and they are admitted and sworn.

Trin. 1634. Upon *Wightwick's* Surrender to *H. Roll* then Chief Justice (*Henly* being then under Sequestration) the Chief Justice grants it to *Sam. Wightwick* and to *Robert Henly Junior* for their Lives, and they are admitted and sworn.

Mich. 12 Car. 2. Upon the Surrender of *Samuel Wightwick* and *Robert Henly* to *Sir Robert Foster* then Chief Justice, he grants it to *Henly* and *Wightwick* for their Lives, and they are sworn. *Wightwick* died soon after, and *Sir Robert Henly* enjoy'd it under that Grant 32 years.

And it was observed on behalf of the Defendant, That in all these Records produced and read in Court, after the mention of the Surrender to the Chief Justice, there are these words, *To whom of right it doth belong to grant that Office whensoever it shall be void.*

It was then further insisted on and proved, That there are in the nature of Clerks, three considerable Officers of the Court of King's Bench: The first and chiefest is the Clerk of the Crown, called sometimes *Coronator & Antornat Domini Regis, &c.* his Business is to draw all Indictments, Informations, &c. in Pleas of the Crown. This Officer being the chief Clerk in Court, is always made by Patent under the Great Seal. The second Officer is this, the Prothonotary or chief Clerk for inrolling Pleas between Party and Party in Civil Matters: He and his Under Clerks do inroll all Declarations, Pleadings, &c. in Civil Causes, especially where the Proceedings are by Bill. This Clerk files in his Office, all Bills, Declarations, &c. and all the Writs of this Court in Civil Matters, are made by him and his Under Clerks, and tested by the Chief Justice. And he hath the custody of all Returns of *Elegits*, *Executions*, *Scire Facias*, and the filing of all *Villes*, every of which are in the Eye and Judgment of the Law, in the hands of the Chief Justice, whose Clerk this Officer is.

The third is the *Custos Breviarum*, who keeps all the Rolls and Records of Judgments in this Court, which are also said to be in the custody of the Chief Justice: And this Office, when void, is in his Gift and Disposal.

It was further shewn on the behalf of the Defendants, That in the Statute of Edw. 6. against the Sale of Offices, there is a *Salvo* to the two Chief Justices and Judges of Assize, to dispose of the Offices in their disposition, as they used formerly. And ever since that Statute, these two Offices of chief Clerk to inroll the Pleas, &c. and the *Custos Breviarum*, have without controul been disposed by the Chief Justice of the Court of King's Bench. And it is also observed, That in the Grant of this Office to Mr. Bridgman the Plaintiff, it is recited that *Henly* and *Wightwick* were *debito modo* admitted to this Office, and yet they never had any Grant from the Crown, nor any other Grant, except that from the Chief Justice before mentioned.

Then to prove the Defendant's Title to the Office, the Grant of the now Chief Justice to them for their Lives, was produced, and read, and proved, that they were admitted and sworn.

To answer all this Evidence, there was produced the Copy of an Act of Parliament which was made in 15 Edw. 3. to this effect: *It is conferred, that if any of the Offices aforesaid (which are other great Offices mentioned in the Act) or the Controller or chief Clerk in the Common Bench or King's Bench, by Death or other Case be enfeoffed of their Office, the King, with the consent of the great Men, &c. shall put another fit person in such Office.* From whence the Plaintiff's Counsel would have inferred, That the King had a right to grant this Office, and that this Act was declaratory of such his Right; and that all the Grants from the Chief Justices ever since that Act, were but Usurpations on the Crown; and that no Usage of granting it by the Chief Justices, could prevail against the King's Right.

To this it was replied, That the Act was repealed, as did appear by the Record it self, as well as by their own Copy produced. And for a further Answer, 'twas said, That the Office in question was not the Office mentioned in that Act, for that Act mentions the chief Clerk of the *King's Bench*, which is the Clerk of the Crown, and so called in the 2 Hen. 4. the *Statute against Extortion*; and he is in reality the chief Clerk in that Court, and hath precedency of this Officer both in Court and elsewhere: And that this Officer is not called chief Clerk in the *King's Bench*, altho' he is the chief for inrolling of Pleas Civil in that Court: And the constant Usage explains the meaning of that Act. And that the Officer called *chief Clerk* was meant to be the Clerk of the Crown; for that that Office hath been always granted by Letters Patents, according to that Act: And the Office in question was never enjoyed one day by virtue of a Grant from the Crown.

The Defendants did further insist, That it was a Scandalous Imputation upon all those chief Justices, who were Persons of Probity and Virtue, and had clear Reputations, to surmise that they imposed and usurped upon the Crown, as they must all have done, if the right of granting this Place be in the King: And

Sir

Sir Robert Heath, that was the King's Attorney, took a Grant of the Office in question from the Chief Justice; and upon his Admittance, the right of the Chief Justice to grant it is affirmed upon Record.

Then all this Evidence on both sides being given, and the same being strong on the Defendants behalf, the Court proposed to the Plaintiff's Counsel to be Nonsuit, which they would not, but prayed the Court to direct the Jury, some of them saying that they would take another Course: And then the Court did briefly sum up the same, and particularly the Evidence of the Act, 15 Edw. 3. and what was urged from it by the Plaintiff, and the Answers made thereto, and left the Matter to the Jury upon the whole. The Jury withdrew, and after some time, gave a Verdict for the Defendants.

Upon this Verdict the Counsel for the Plaintiff prayed leave to bring in a Bill of Exceptions, and produced in Court, and tendered to the three Judges to be sealed, a Parchment Writing in form of such a Bill; in which, after a Recital of the Declaration, and Issue in the Cause, 'tis alledged, That the Plaintiff's Counsel produced in Evidence the Grant of the Office to the Plaintiff; and that they shewed to the Court and Jury, that the Office is of the Grant of the Crown: And that to make out the Right of King Charles the Second to grant this Office to the Plaintiff, they gave in Evidence the 15 Edw. 3. which in the Bill is set out at large (and is in Substance, as is before set forth.) And 'tis further alledged in the Bill, That the Justices refused to allow, admit, and receive the Allegations and Matters given in Evidence, as sufficient to prove the Plaintiff's Title to this Office, by reason whereof the Jury found; That the Defendant did not disseize the Plaintiff; and prays that the Justices would put their Seals to it, according to the Statute of Westminster 2. cap. 31.

The Justices upon reading this Bill, did refuse to Seal it,

1. Because 'tis asserted therein, That the Plaintiff's Counsel did show that this Office was of the Gift and Grant of the King, whensoever it should be void; whereas there was no such Evidence to show any such Right in the King offered, or pretended to, besides the Patent in question, and the Act of Edw. 3.

2. That the Judges refused to allow, admit, and receive the Allegations and Matters given in Evidence for the Plaintiff, as sufficient to maintain his Title; whereas they were given in Evidence and considered; and if it be meant, as a sufficient Evidence to controul and over-rule all other, that doth not belong to the Court in Trials to determine, unless referred to them upon demurrer to Evidence, but is the proper business of the Jury; and if the Party be aggrieved, the Remedy is an Attaint. Nor can it be pretended that the Defendants Evidence was admitted to over-rule the Record

produced, because no Objection was made to the Defendants Evidence at the Trial, and the same was all given before the Record of 15 Ed. 3. was produced, and consequently the Jury must consider the force of it; for Evidence on both sides being given, by the Law of England, the Decision of the Right belongs to the Jury; and the Act of Edw. 3. being repealed, 'tis no Matter of Law, but the most which could be made of it, was, that it was Evidence, which must be left to the Jury, together with the Defendants Evidence. But no Bill of Exception will lye in such a Case by the Statute, when the Evidence given is admitted as Evidence, and left to a Jury; and where no Opposition was made to the Defendants Evidence, as here in this Case; and therefore in this Case a Bill of Exception could not be warrantable, because the Plaintiffs Evidence was not refused or over-ruled; nor was the Defendant's Evidence fit to be rejected, or so much as opposed by the Plaintiff. And as to the Allegations made by the Counsel, and not proved, those never could be an Exception. And for these and other Reasons the Judges refused to Seal their Bill.

Upon this a Writ of Error is brought, and a Petition was exhibited to the Lords Spiritual and Temporal in Parliament assembled, in the Name of the Lady *Isabella* Dutchess of *Grafton*, and *William Bridgman* her Trustee, showing that King *Charles* the Second granted the Office in question to *W. B.* for the Lives of *Henry* Earl of *Arlington*, *Henry* Duke of *Grafton*, and of the Petitioner the Lady *Isabella* in Trust for the Duke, his Executors and Administrators, to commence after the Death of Sir *Robert Henly*; that upon the death of Sir *Robert Henly*, the Petitioner by virtue of the said Grant, was well intituled to the said Office, but was interrupted in receiving the Profits by *Rowland Holt* Esq; Brother to the Lord Chief Justice *Holt*, and by *Edward Coleman* Gent. who pretended to be admitted thereto by some Grant from the Chief Justice; that thereupon an Assize was brought for the said Office, which came to Trial; and the Petitioners Counsel insisted upon an Act of Parliament, proving the King to have the Right of granting the said Office, which the Judges would not admit to be sufficient to prove the King's Right to grant the same. That the Petitioners Counsel did thereupon pray the benefit of a Bill therein to be allowed, and sealed by the Judges according to Law. And the Petitioner's Counsel, relying upon the said Act of Parliament as sufficient proof of the King's Right, duly tendred a Bill of Exceptions before Judgment in the Assize, which the Judges upon the Trial said they would Seal, yet when tendred to them in Court before Judgment, would not Seal the same. Thereupon Judgment was entred against the Petitioners Title in the Assize by default of the Judges not allowing and sealing the said Bill, according to the Duty of their Office by Law, whereby they are hindred from making the Matter of the said Bill part of the Record of the said Judgment now brought and depending before your Lordships, upon a Writ of Error in Parliament, for reverfing
the

the said Judgment in the Assize, and so are precluded from having the full benefit of the Law by the said Writ of Error, to examine, reverse, and annul the said Judgment: Wherefore the Petitioners prayed that their Lordships would be pleased to order the said Judges, or some of them, to Seal the said Bill of Exceptions, to the end the said Case might (as by Law it ought) come intirely before their Lordships for Judgment, &c.

Upon reading this Petition, 'twas ordered that the Lord Chief Justice, and the rest of the Judges of the Court of *King's Bench*, should have Copies of the Petition, and put in their Answer thereunto in Writing on next.

At the Day appointed there was deliver'd an Answer in these, or the like words:

The Answer of William Dolben, William Gregory, and Giles Eyre Knights, three of their Majesties Justices, assigned to hold Pleas in their Court of King's Bench at Westminster, to the Petition of the most noble Isabella Dutchess of Cráston, and William Bridgman, exhibited by them to your Lordships.

THese Respondents by Protestation not owning or allowing any of the Matters of the Petition to be true, as they are therein alledged, and saving to themselves the benefit of all the severall Statutes herein after mentioned, and all the Right they have, as Members of the Body of the Commons of *England*, to defend themselves upon any Trial that may be brought against them, for any thing done contrary to their Duty, as Judges, according to the due Course of the Common Law, which Right they hold themselves obliged to insist upon, in answer to the said Petition, think themselves bound to shew, and offer to your Lordships consideration,

That the Petition is a Complaint against them for refusing to Seal a pretended Bill of Exceptions, contrary to a Statute in that behalf, as the Petition pretends, without setting forth the tenour of the said Statute, or what that pretended Bill was; whereas that Statute is the Statute of *Westminster 2. cap. 31.* and doth enact, That if any impleaded before any Justices, doth offer an Exception, and pray the Justices to allow the same, and they refuse so to do, the Party offering the Exception, is thereby to write it, and pray the Justices to Seal it, which they, or one of them, are thereby enjoyned to do: So that if the pretended Bill was duly tendred to these Respondents, and was such as they were bound to Seal, these Respondents are answerable only for it by the Course of the Common Law, in an Action to be brought on that Statute, which ought to be tried by a Jury of Twelve honest and lawful Men of *England*, by the Course of the Common Law; and not in any other manner.

And

And the Respondents further shew, and humbly offer to your Lordships consideration, That the Petition is a Complaint in the nature of an Original Suit, charging those Respondents with a Crime of a very high Nature, in acting contrary to the Duty of their Office, and so altogether improper for your Lordships Examination or Consideration, not being any more triable by your Lordships then every Information or Action for breach of any Statute Law is, all which Matters are by the Common Law, and Justice of the Land, of Common Right to be tried by a Jury.

And the Petition is wholly of a new Nature, and without any Example or Precedent, being to compel Judges, who are by the Law of the Land to act according to their own judgments, without any Constraint or Compulsion whatsoever, and trenches upon all Mens Rights and Liberties, tending manifestly to destroy all Trials by Jury.

And it is further manifest, That this Complaint is utterly improper for your Lordships Examination, for that your Lordships cannot apply the proper and only Remedy which the Law hath given the Party in this Case, which is by awarding Damages to the Party injured (if any Injury be done) for these are only to be assessed by a Jury. And they, these Respondents, are so far from apprehending they have done any wrong to the Petitioners in this Matter, that they humbly offer, with your Lordships leave, to waive any Privilege they have, as Assistants to this Honourable House, and appear *gratis* to any Suit that shall be brought against them, in *Westminster-hall*, touching the Matter complained of in the Petition.

And they further, with all humility, offer to your Lordships Consideration, That as they are Judges, they are under the Solemn Obligation of an Oath to do Justice (without respect of Persons) and are to be supposed to have acted in this Matter with, and under a due regard to that Sacred Obligation; and therefore to impose any thing contrary upon them, may endanger the breaking of it, which they humbly believe your Lordships will be tender of.

And they further humbly shew to your Lordships, That by a Statute made in the 25th of *Edw. 3. cap. 4.* it is enacted, That from thenceforth none shall be taken by Petition or Suggestion to the King, or his Council, unless by Indictment or Presentment of good and lawful People of the Neighbourhood, or by Process by Writ Original at Common Law; and that none shall be put out of his Franchise or Freehold, but by the Course of the Common Law. And by another Statute in the 28th of *Edw. 3. cap. 3.* it is expressly provided that no Man shall be put out of his Lands and Tenements, nor imprisoned or disinherited but by due Process of Law. And by another Statute made in the 42 *Edw. 3. cap. 3.* it is enacted, That no Man shall be put to answer, without Presentment before Justices, or Matter of Record on due Process and Original Writ, according to the old Law of the Land.

And

And the Respondents further say, That inasmuch as the Petition is a Complaint, in the nature of an Original Cause for a supposed Breach of an Act of Parliament; which Breach (if any be) is only examinable and triable by the Course of the Common Law, and cannot be so in any other manner, and is in the Example of it dangerous to the Rights and Liberties of all Men, and tends to the Subversion of all Trials by Juries, these Respondents conceive themselves bound in Duty (with regard to their Offices, and in Conscience to the Oaths they have taken) to crave the benefit of defending themselves touching the Matter complained of in the Petition, by the due and known Course of the Common Law; and to rely upon the aforesaid Statutes, and the Common Right they have of Free-born People of *England*, in Bar of the Petitioners any further proceeding upon the said Petition, and humbly pray to be dismissed from the same.

Then it was after Debate ordered, That Counsel be heard at the Bar of the House on the said Petition.

And afterwards upon the Day appointed for the hearing of Counsel, it was insisted on, in the behalf of the Petitioners, That here was a Right, and a Right proved, and no ways to come at it but this; that if a Bill of Exceptions be tendred and refused, this House can command them to do it; that this proceeding of the Judges is to stifle the Matter of Law; the Writ upon the Statute must be returnable here, and cannot be otherwise; that this follows the Judgment into Parliament; that this House is to judge of every thing belonging to that Judgment; that if this cannot be done, there will be a failure of Justice; that there have been Writs of Error upon Judgments, with the Bill of Exceptions annexed; that Damages to be recovered in an Action, gives no Reparation for the Office; that the Action must be brought before the Judges, and so it must be a Dance in a Circle; that as to the Judges Oaths, the Justices of Peace are upon their Oaths, and yet they may be committed; that this is not fit for a Jury to try, Whether the Judges have done well or ill in refusing to Seal this Bill of Exceptions: This Refusal is the way to keep the Law within the Bounds or Walls of *Westminster-hall*, and effectually to prevent its ever coming hither; that this was not a Complaint of the Judges; that as yet they would not accuse them of a Crime, they only said, *fac hoc & vive*; that the Court of *King's Bench* below doth the same thing to the Judges in *Ireland*; they command others, and ought to be commanded; that they themselves send Mandatory Writs, as the Cases are in *Telver's & Cro.Car.* That the Lords had directed the Judges in many things; and so they did in *Jeffrey Stanton's Case*; that by Command under the Privy Seal things have been done, which otherwise would not; and my Lord *Shaftsbury* was remanded to the *Tower* upon the Authority of that Case, 15 *Edw. 3.* the Statute says that the Peers shall Examine; for by great Men are meant the Peers.

Then

Then were urged certain Cases, where the Lords had commanded the *Chancery* to proceed speedily, and to give Judgment, *See* Earl of Radnor's Case; *Englefield* and *Englefield*, and other like Cases were quoted; and from thence they argued the Power of the Lords to command the Judges to do the thing desired.

It was argued on the other side against the Petition to this effect, That this was a Cause of great consequence in respect of the Persons concerned, as also of the Subject Matter, it being the Complaint of a Noble Peeress against three of the Judges, before whom she was lately a Suitor; and concerning the Jurisdiction of this House: That this Petition was the most artificial which could be contrived to hinder the Justice of the Law, and to procure a Determination in prejudice of Two hundred thirty five years enjoyment; that it is designed to get a Cause to be heard and adjudged on a Writ of Error by the Evidence on one side only, or rather by that which was no Evidence at all, if the Copy produced at the Trial was true: for now upon the return of what they desire, nothing of the Defendants Evidence would or could appear. When a Bill of Exceptions is formed upon the Statute, it ought to be upon some point of Law, either in admitting or denying of Evidence, or a Challenge, or some Matter of Law arising upon Fact not denied, in which either Party is over-ruled by the Court. If such Bill be tendred, and the Exceptions in it are truly stated, then the Judges ought to set their Seal, in testimony that such Exceptions were taken at the Trial: But if the Bill contain Matters false or untruly stated, or Matters wherein they were not over-ruled, then they are not obliged to affix the Seal; for that would be to command them to attest a falsity; a Bill is not to draw the whole Matter into Examination again; 'tis only for a single point; and the truth of it can never be doubted after the Bill is sealed; for the adverse Party is concluded from averring the contrary, or supplying an Omission in it.

This Bill was without Foundation; the Plaintiff was not over-ruled in any one Point of Law: 'Tis true, the Counsel desired the Opinion of the Court after all the Defendant's Evidence had been heard, concerning their Record, and the Judges did declare, that they thought it did not extend to the Office in question, but to the Clerk of the Crown, who is the chief Clerk in Court, and hath precedency; and the Grant of that Office by the King, both before and since that supposed Act, proves that to be meant, and not the Office in question, which hath always been granted by the Chief Justice: and this was afterwards left to the Jury. Here was no cause for a Bill of Exceptions, the Judges at the Counsels desire gave their Opinion upon the thing, but did not over-rule them; for that the Act being repealed, could make no Point of Law, but only be Evidence for the Jury to consider.

Besides,

Besides, this Act, tho' repealed, is inserted in the Bill as an Act in force; And if an Act be set out, and no repeal appears, it must be understood to be in force; and if the Bill had been sealed, it must have been taken as in force, and the Defendants could not here upon the Writ of Error have shewn the repeal, which was in the 17 *Edw. 3.* and appeared so upon the Evidence; from whence 'twas inferred, That this Bill was too artificial. If any point of Law had arisen upon the whole Evidence (and a particular point there was none) the whole ought to have been inserted in the Bill, or at least all that which concerned that Matter.

If this should be allowed, 'twould be in the power of any Counsel to destroy any Verdict; as in case of a Title by Descent from Father to Son, and a Will of the Father had been produced and proved at the Trial, and a Bill had been sealed, only shewing the Seisin and Descent, the Son must prevail, tho' he had no Title. This is enough to shew that the Judges are not obliged; nay, are obliged, not to Seal this Bill.

Then it was argued, That the present Complaint is beneath the Honour, and besides the Jurisdiction of the House of Peers ; that this was a Complaint of a Default in the Judges, which cannot be tried in this place; that *Magna Charta* was made for them as well as for others ; that if they offend against any Rule of the Common Law, or particular Statute, whether in their Personal behaviour, or as Judges, they are triable only by their Peers ; that Peers are only such *qui pari conditione & lege vivunt* ; that the Crown and Constitution of England had so far exalted their Lordships in their State and Condition, that 'tis beneath them to judge or try Commoners ; that all Powers and Priviledges in this Kingdom, even the highest, are circumscrib'd by the Law, and have their limits : That this is a Complaint of a great Crime in the Judges, a Breach of their Oaths, and with the insinuation of Partiality to one of themselves ; which if true, incurs loss of their Offices, and Forfeiture of their Estates by Fine, and of their Liberty by Imprisonment ; and all this to the King ; besides Damages to the Party grieved ; and therefore it concerns them to have the benefit of the Law.

That this comes not regularly into the House; 'tis not any matter of Advice to the King, nor of Privilege, nor of Contempt to this Court, because the Matter complained of was before any Judgment below, or any Jurisdiction could be attached here, by pretence of the Writ of Error. 'Tis brought hither by way of Complaint for a supposed Miscarriage in *Westminster-hall*, in a private Cause between *Bridgman* and *Holt*, two Commoners: It presumes the Lords to be proper Judges in the first Instance, for the hearing and punishing of all Offences committed by the Judges, and that in a Summary way upon a Petition, and without that due Process of Law, which is established under our Government.

Either

Either this Refusal is punishable, or not; If not, the Petition ought to be rejected: If it be, 'tis either by the Common Law, or by Act of Parliament; but neither do warrant this Practise of Petitioning; and the old Law is that, which past Ages have approved, and that by which Justice is to be administred; and whatsoever is done by way of Judgment in a different manner than the Law allows, is against that Law.

The proceeding in this manner is against the Consent of the Respondents, for they have Pleaded to the Jurisdiction of this House as to this matter, &c. and therefore it differs from all Cases, where the Parties concerned have Answered the Complaint, and thereby submitted the same to an Examination; and this will prevent the force of many precedents which may be Cited on this occasion. Some Persons perhaps have from a confidence of Success, or from a slavish Fear, or private Policy, forbore to Question the Power of their Superiors; but the Judges must betray their Reputation and their Knowledge of the Laws, if they should own a Jurisdiction, which former times and their Predecessors were unacquainted with.

'Tis necessary to answer the pretence of a failure of Justice, in case this method be Rejected; and therefore it must be observed, That our Law knows nothing of extraordinary means to redress a Mischief, but that upon a defect of ordinary ones, recourse is to be had to the Legislature, and to that only, either to explain and correct in reference to things past, or to provide remedies for the future. But here is a common easie means of relief, if there had been occasion.

By the Statute of Westminster, 2 cap. 31. In case the Judge refuses, then a Writ to Command him, which is to issue out of Chancery, *quod apponat sigillum suum*; and then a Writ to own or deny his Seal.

By 2 Inst. 406. the party grieved by the denial, may have a Writ upon the Statute, Commanding the same to be done, *juxta formam Statuti*, Reg. 182. *Fletch. Natura brevium*, 21. and 11 Hen. 3. 51, 62, 63. there's the form of the Writ set out at large. It recites a surmise of an Exception taken and over-ruled, and it follows *vobis precipimus, quod si ita est, tunc sigilla vestra apponamus*. It is conditional, if the Bill be true and duly tendered, then this Writ, and if it be returned, *quod non ita est*, then an Action for a false return, and thereupon the surmise will be tried, and if found to be so, Damages, and upon such a Recovery, a peremptory Writ Commanding the same; that the Law is thus, seems plain; tho' no precedent can be shewn of such a Writ 'tis only for this Reason, because no Judge did ever refuse to Seal a Bill of Exceptions, and none was ever refused, because none was ever tendered like to this, so artificial and groundless. But that such Actions lie upon this Statute, were Cited Regist. 174. Nat. Br. 10. and they are called Attachments, and Damages shall be to the Party and a Fine to the King; so it is in all Cases of Statute Laws, which do either prohibit or Command the doing

doing of a thing for the advantage of any person, such person, if injured by a disobedience to that Law is intitled to an Action, tho' the Statute doth not in expresse words give one. 2 Inst. 35. 74. 118. 131. and the same holds in judicial proceedings, the Case of the *Marshalseas*, 10 Rep. 75. 4 Edw. 4. 37. and the same Reason warrants the Action for a *Scandal Magnas*: But perhaps 'twill be said, that tho' an Action lies for a disobedience to this Writ, yet the Writ not being returnable, no Action lies for a false return, and consequently no peremptory Writ, and by consequence there's no adequate remedy in case of an unjust Refusal; but to this it may be answered, That the Writ being Conditional, 'tis a good Answer to it, that the Fact was not as is surmised, and that return will justify the Refusal: And certainly such return may be made; and if not, when the first Writ is proved to be true in all its Suggestions, by Judgment in an Action for not obeying it, the same Reason will warrant a peremptory Writ; But whether this be thus, or not, it only argues an imperfection in the Law, proper for the notice of the Legislature, and will not justify the method of proceeding, now attempted here in this place.

It hath been Objected, That such Proceedings are not like to be successful, because Judges still are to try those matters; but these are Reflections not Arguments, and our Constitution is founded on a Notion, that parity of Condition is the best Qualification of a trier; and here must be a Jury to try the Fact, and they are subject to an Attaint, if their Verdict contradict the Evidence: And no direction of a Judge can excuse them, for if it be a point of Law, they are not oblig'd to find a special Verdict, but may find a general one upon their own peril of an Attaint. Then,

Either this is designed as a Criminal proceeding against the Judges, in order to Punishment, or as a Civil proceeding, for to gain Damages to the Party, or else neither one nor the other, but to have an Order Commanding the thing to be done; which if refused, then to have them compelled by Imprisonment, *quo-usque*, &c. neither of the first are pretended; and the last is not a Warrantable method, when the Law hath prescribed a Writ in Chancery, and that's not prosecuted.

Here cannot be tried the particular requisites to ground such an Order as they desire, as whether the Evidence or Exception as stated, was offered at the Trial, or if offered, whether 'twas over-ruled, nor whether the matter offered were believed, for if not believed, it makes no Evidence, and so can raise no point in Law; There can be no Jury impanelled to try this, nor can an Issue be directed hence for the trial of it.

By this means, the Judges lose the benefit of that legal Trial, by a Jury of their Peers, which is their fence and protection against Power, Art, or Surprize; the best for indifference and discovery of Truth. The Institution of the Law is cautious and wise in its provision for both. Challenges are admitted below;

'tis derogatory to the Honour of this Court, to suppose it necessary here; but to have it in *Westminster-Hall*, is however reckoned a Commoner's privilege and Birth-right; there the Law is determined by one, and the Fact is ascertained by another; here both are in the same hands: Not that any Jealousie can be supposed of mischief by it in this House, but the practice of it now may give precedent to future Reigns and Ages, in which there may be danger of a partiality.

Below, there are by the Law appointed and provided particular Terms and days for doing Justice, and they are certain, the distances between them are known, according to the nature of the Suit; which capacitates the parties concerned, their Agents and Witnesses, to be ready, and there can be no surprize.

It must not be presumed, That this House may err, but if any Error be possible, 'tis impossible for the Judges to be relieved, for these Reasons; in respect of the Court, for no Address can be made in such case, but to the same persons who did the wrong; which is always with some prejudice or disadvantage, because the party Erring is to Judge, if he himself hath Erred. Then the Proceedings here being in English and Summary, it cannot well be made appear, what was the proof in the first instance, no Record being kept thereof. Then suppose Evidence be allowed, which is none, the person against whom the same is given, is remediless; these Evils may happen in the repeating of this practice in the next Reign, tho' they cannot in the present.

Then this method is not only against the general tenor and frame of the Common-Law, but against divers Acts of Parliament and Declarations of this House.

Magna Charta, 9 Hen. 3. cap. 29. is express, *per judicium parium vel per legem terre*, now the latter only refers to such cases which are not Triable, *per jud' par'*: besides, to make it the *lex terra*, there must be Ancient and continual usage, 22 Edw. 3. numb. 30. shews that no new practice can make a Law.

By 25 Ed. 3. cap. 4. 'tis Enacted, That no Man shall be taken by Petition or Suggestion to the King, or to his Counsel, without Presentment, or by process or Writ Original at Common-Law, and that none shall be put out of his Franchise or Freehold, but by due course of Law before used; here the one explains the other; by Writ or due course of Law are taken for the same thing, and both used in contradistinction to Petition; the 28 Ed. 3. cap. 3. is the same.

Then the 42 Edw. 3. cap. 3. 'tis by due process and Original Writ according to the Old Law of the Land; the 1 Rich. 2. numb. 87. *Cott.* 162. no Suit to be determined before the Lords or before the Counsel, but before the Justices only.

But the 4 Hen. 4. cap. 23. is fuller, it recites, That in Pleas as well real as personal in the King's Courts, the parties be made to come upon grievous pain, sometimes before the King himself, sometimes before the King's Council, sometimes to the Parliament,

ment, to answer thereof anew to the grievance of the Parties, and in Subversion of the Common-Law of the Land, 'tis Enacted, that after Judgment, the Parties shall be in Peace until the Judgment be undone by Attaint or Error; this is agreed and amplified, 3 *Bulst.* 47. 115.

Here is mention even of the Parliaments Summoning persons to Answer, in Subversion of the Laws.

There are other Statutes not Printed, as 4 *Edw.* 3. numb. 6. *Cotton's Abridg.* 7. and the same in 2 *Inst.* 50.

The Lords gave Judgment of Death without Indictment, upon some who were not their Peers, and agreed in full Parliament, that they should be discharged of so doing for the future, and that it should not be drawn in President, that the like should not be done on any but their Peers; 'tis a Declaration of the Lords, nay, 'tis an Act of Parliament, and penned in the same manner, as 29 *Edw.* 1. Statute *del Estoppel.* at a Parliament agreed: 33 *Edw.* 1. by common accord, and 9 *Edw.* 2. the King in Parliament by Advice of his Council, and these are held to be Statutes.

This was not only an acquittal from the trouble, but a clear denial of the Power, as appears by the words before, that they had assumed upon themselves, and the words subsequent, that the like should not be done again. The Complaint was, because it was intermeddling with Commoners after that manner. Suppose this House should make an Order upon this matter, which is a Law business and not of Equity, no Execution can be made of it but Commitment.

There is the 15 *Edw.* 3. now insisted on, Printed in the Old Statute Book, but omitted in this; 'tis in *Cotton*, 28. 33. and, 'tis thus, the Commons complained of breaches of *Magna Charta*, &c. and pray remedy, with this Conclusion, That every Man may stand to the Law according to his Condition, and the Lords pray, that *Magna Charta* may be observed, and further, that if any of what Condition soever, should break it, he should be adjudged by the Peers of the Realm in Parliament, the next Parliament, and so from Parliament to Parliament, and it was Enacted accordingly. This was Specious, the same being only for the breakers of *Magna Charta*, but in 17 *Edw.* 3. that whole Parliament, i. e. all the Acts of it are Repealed; which Repeal, seems designed for the Petitioners, for it Repeals the supposed Laws which make both their Title and this Jurisdiction which they would support. 'Tis observable what is said in the Repeal, that the Act was contrary to the King's Oath, in prejudice of his Crown and Royalty, and against the Ancient Law: And such is this, for here's no use of the King's Writ, no Address to or Command by the King for this Proceeding, nor any mention of his name in the Petition.

By 1 *Hen.* 4. cap. 14. Appeals in Parliament for Offences, are declared against, as contrary to Reason and the Constitution; this is such. This is not incident to the Power of Hearing and Determining upon the Writ of Error, because as was said before,
it

It belongs properly to the Chancery, to Issue a Writ Commanding it to be done, *Si ita est*, as is Suggested.

By 12 Rep. 63. the King himself cannot take any Cause out of the Court where it depends, and give Judgment on it himself.

And this House can make no Order upon this Petition that will be a Record, as in *Hob.* 110. The Petition is in the name of a Person, not party to the Record, which seems very new, 'tis by a Stranger in the eye of the Law to the Cause, and consequently ought not to be joyned in any legal proceeding, if this be such.

This is not incident to the Jurisdiction of the Error; no more than Amendment of an Error in the Court from whence the Record comes, or the filing of a Baile, a Declaration, or a Warrant of Attorney, or the Sueing out another Process in Defect of one lost or the like. These things are never Examinable in the Superior Court, for in these Collateral things the other are intrusted.

Here's no Hardship upon the Petitioner for he might have been Non-suite, or have given this Repeal'd Act in Evidence at first, and then have demurr'd on the Defendant's Evidence, or might have Sued a Writ on the Statute of *Westminster 2.*

But suppose this House should Examine this matter, and find the Petition to be groundless, will such Determination prevent the Judges from being troubled by Sueing of the Writ afterwards. Suppose it *E contra*; that this House should punish the Judges and commit them, and award Damages, or make other Order in favour of the Petitioners, would such Order bar or stop the legal process afterwards; can any Order made here be used below, as a Recovery or Acquittal, as an *Auterfoits Convict*, or *Auterfoits Acquitté*.

If there be any thing in it, 'tis a breach of a Statute Law; for which they are punishable at the King's Suit; will the proceeding here save them from the trouble of answering to an Indictment or Information for the same thing.

Then since a Writ lies to Command them to Seal this Bill, and since an Act of Parliament directs it, if it were a true one, perhaps it may be Questionable, if they do not break their Oaths, in case they sign it in Obedience to any other direction. If they did it in Obedience to the Royal Word, Signet or Privy Seal, of the King their Master, 'twould be a breach of their Oath. Then as to presidents of the Exercise of such a Jurisdiction, none come near this: And abundance of particular Cases were put and answered; but the considerable one was *Jeffery Stanton's Case*, 14 *Edw.* 3. 31. *Cor.* 30.

The Case is odd, 'tis in *Fins. Abridgment*, *thi apoucher*. 119. there is a Writ directory to the Judges to proceed to Judgment, or to bring the Record before the Parliament, that they might receive an Averment, &c. To this Case it was Answered, That the same was long before most of the Statutes aforementioned, and in full Parliament,

Parliament, and in that Case *Stone* would not agree to it, but adhered to the Law according to his Opinion, 'tis true, *Shard* in the absence of *Stone*, gave Judgment according to that Advice, but a Writ of Error was afterwards brought in the *King's-Bench*, and the Judgment was Reversed, 15 *Edw. 3. B. R.* even contrary to the Advice of Parliament, to the other Judges.

As to the other Cases of Property Examined here, either the Parties submitted to Answer, or they were at the Suit or Complaint of the Commons, or by Consent of the King and Commons, but none of them carry any resemblance to this, where the Judges insist upon it, that there is another and a proper Remedy. All the Cases in *Roley's Placita Parliamentaria*, are either Ordinances of Parliament, or directions to follow before the Justices. But there's no President to warrant this Petition, and therefore 'twas prayed, that the Petition might be Dismissed. . .

And afterwards

Dominus Rex

Versus

Walcott.

WRIT of Error to Reverse a Reversal in *B. R.* of an Attainder for Treason, before Commissioners, &c. at the Old-Baily, against *Walcott*; the Record was thus, *Gulielmus Tertius, Dei Gratia Anglia, Scotia, Francia, & Hibernia, Rex, fidei Defensor, &c. dilecti & fideli nostro Johi Holt, Militi Capitali iusticiario nostro ad placita coram nobis tenenda assigna salutem Regia in Recordis & Processibus ac etiam in redditione Judicii cujusdam Indictamenti versus Thomam Walcott, nuper de London Generosum modo defuncti pro quibusdam alius perditionibus personam Domini Caroli Secundi nuper Regis Anglia tangent modo indictat fuit & superinde per quand' Jur superinde in prefat' nuper Regem & prefat' Thomam Walcott, cap' coram Justis dicti nuper Regis ad Gaalam Deliberand' assigna convict' exist' & Judicium superinde reddit' fuit pro prefat' nuper Rege versus prefat' Thomam Walcott, ut dicitur, que quidem Recordum & Processum predicti causa erroris interveniant in Curia nostra coram nobis venire fecimus & Judicium inde in eadem curia nostra coram nobis regensatur & quia in reversione Judicii predicti coram nobis super bre' de Error' predicti Erro' intervenit manifestus ad grave Dampnum cujusdam Habbellæ Dillon Vidua Comitisse Roscamon nuper Uxoris Wentworth Dillon armig' nuper Comitissæ Roscamon in Regno nostro Hibernie fuit ex quærela sua accept-*

mini Caroli Secundi nuper Regis Angliæ, &c. ad Goalam prædictæ deliberandæ assignæ convictæ existit & judicæ superinde redditæ sit ut dicitur Error intervenit manifestus ad grave dampnum Johannis Walcott Genæ filij & heredæ prædicti Thomæ sicut ex quærela sua accepimus Nos Errorem siquis fuit modo debito corrigi & eidem Johanni plenam & celerem Justiciam fieri volentes in hac parte vobis Mandamus quod si Judicium redditæ sit tunc Record & Processus prædicti cum omnibus ea tangentibus nobis sub Sigillis vestris vel unius vestrum distincte & aperte mittat & hoc Breve ita quod ea habeamus a die Paschæ in tres septimanas ubicunque tum fuerimus in Angliâ ut inspecti Record & Processus prædicti ulterius inde pro Errore illo corrigendæ fieri faciamus quod de jure & secundum legem & consuetudinem Regni nostri Angliæ fuerit faciendæ Teste meipso apud Westm. decimo septimo die Martij Anno Regni nostri septimo.

Executio istius Brevis patet in Scheda & Recordo huic Brevi annexo.

Respons. Thomæ Lane Mil. Major. Civitat. London ac unius Justiciæ infra scripti Record & Processus unde in Brevi superdictæ fuit mentio sequitur in hæc verba.

London ff. Memorandum quod per quandam Inquisitionem Cap. pro Serenissimo Domino Rege apud Justice-Hall in the Old Bailey, London, in Parochia Sancti Sepulchri in Warda de Faringdon extra London prædictæ die Jovis scilicet duodecimo die Julij Anno Regni Domini nostri Caroli Secundi Dei gratia Angliæ Scotiæ Franciæ & Hiberniæ Regis Fidei Defensor &c. tricesimo quinto coram Wilhelmo Prichard Mil. Majore Civitat. London, Francisco Pemberton Mil. Capitali Justiciæ Domini Regis de Banco, &c. ac aliis Sociis suis Justiciariis dicti Domini Regis per Literas Patenti ipsius Domini Regis eisdem Justiciariis prænominae & aliis ac quibuscunque quatuor vel plur. eorum sub magno Sigillo dicti Domini Regis Angliæ concessæ ad inquirendæ per sacramenti proborum & legalium hominum de Civ. London ac aliis viis modis & mediis quibus melius scierint aut poterint tam infra libertat. quam extra per quas rei veritas melius sciri poterit & inquir. de quibuscunque Prodition. Misprision. Prodition, &c. infra Civitat. prædictæ tam infra libertat. quam extra per quoscunque & qualitercunque habit. fact. perpetrat. sive commiss. per quos vel per que cui vel quibus quando qualiter & quomodo & de aliis articulis & circumstant. præmissa & eorum aliquod vel aliqua qualitercunque concernen. plenius veritas & ad eadem & al. præmissa audiendæ & terminandæ secundum legem & consuetudinem Regni dicti Domini Regis Angliæ assignat. per sacramenti Rich. Alie Arm. & aliorum proborum & legalium hominum Civitat. London prædictæ qui ad tunc & ibidem jurat. & onerat. existent. ad inquirendæ pro dicto Domino Rege pro Corpore Civitat. prædictæ extitit. presentat. quod Tho. Walcott nuper de London Gen. ut falsus Proditor contra illustrissimum & excellentissimum Principem Dominum nostrum Carolum Secundum Dei gratia Angliæ Scotiæ Franciæ & Hiberniæ Regem & Naturalem Dominum suum timorem Dei in Corde suo non habens nec debuit Ligeant. suam ponderari sed instigatione Diabolica mot. & seduct. dilect. soneret veram debitam

& naturalem obedientiam quas verus & fidelis subditus dicti Domini Regis
 erga ipsum Dominum Regem gereret & de jure gerere teneretur penitus
 subtrahens & totis viribus suis intendens pacem & communem tran-
 quillitatem hujus Regni Angliæ perturbare & guerram & rebellionem contra
 dictum Dominum Regem suscitare & movere & gubernare dicti Do-
 mini Regis in hoc Regno Angliæ subvertere & dictum Dominum Re-
 gem a titulo Honore & Regali nomine Coronæ Imperiali Regni sui An-
 gliæ deponere & deprivare & dictum Dominum Regem ad mortem &
 finalem destructionem adducere & ponere secundo die Martij Anno Regni
 Domini Caroli secundi nunc Regis Angliæ, &c. tricesimo-quinto &
 diversis aliis diebus & vicibus tam antea quam postea apud Parochiam
 Sancti Michaelis Bassieshaw in Warda de Bassieshaw London multi-
 tudine & proditorie cum diversis aliis proditoribus juræ prædictæ ignot con-
 spiravit compassavit imaginatus fuit & intendebat dictum Dominum
 Regem supremum Dominum suum non solum de Regali statu titulo po-
 testate & Regimine Regni sui Angliæ deprivare & deicere verum etiam
 eundem Dominum Regem interficere & ad mortem adducere &
 ponere & antiquam gubernat hujus Regni Angliæ mutare alterare &
 penitus subvertere ac stragem miserabilem inter subditos dicti Domini
 Regis per totum Regnum suum Angliæ causare & procurare ac insur-
 rectionem & rebellionem contra dictum Dominum Regem movere & suscita-
 re infra hoc Regnum Angliæ & ad easdem nefandissimas prodicionem
 & proditorias compassationem imaginationem & proposita sua prædicta perim-
 plenda & perficienda idem Thomas Walcott ut falsus Proditor tunc &
 ibidem & diversis aliis diebus & vicibus tam antea quam postea multitudine
 proditorie & advisate se assemblebat conveniebat & consultabat cum
 prædictis aliis proditoribus juræ prædictæ ignot & cum eisdem tractabat de &
 pro eisdem suis prodicionibus & proditoris compassationem imaginationem
 & propositis suis prosequenda exequenda & perimplenda quodque idem
 Thomas Walcott ut falsus proditor multitudine proditorie & advisate
 tunc & ibidem & diversis aliis diebus & vicibus tam antea quam postea
 super se assumebat & prædictis aliis proditoribus promittebat se fore
 auxiliantem & assistentem in executione prodicionis & proditoris compassa-
 tionis imaginationis & propositi sui prædicti perimplendi & per-
 ficiendi & easdem nefandissimas prodicionem & proditoris compassationem
 imaginationem & proposita sua prædicta perimplenda & perficienda idem
 Thomas Walcott ut falsus proditor multitudine proditorie & advisate
 tunc & ibidem arma videlicet Anglice Blunderbusses,
 Bumbard Anglice Carbines, Selop Anglice Pistols & procurabat
 & preparabat contra Ligentiam suam debitam contra pacem dicti Domini
 nunc Coronæ & Dignitatis suæ, &c. necnon contra formam statuti in
 hujusmodi casu editi & promissi, &c. per quod præceptum fuit videri Civitatem
 prædictam quod non omittit &c. quin caperent præfatum Thomam Wal-
 cott & &c. ad respondendum &c. & modo scilicet ad deliberationem Gaule
 dicti Domini Regis de Newgate tenet per Civitatem London apud Ju-
 stice-Hall prædictam in dicta Parochia Sancti Sepulchri in Warda de
 Faringdon extra London prædictam dicto die Jovis undecimo die
 Julij anno tricesimo quinto supradictæ coram præfatis William Pritch-
 ard Mil. Majore Civitatis London ac aliis Sociis suis Justiciariis dicti
 Domini Regis ad Gaule suam de Newgate de Prison in ea existen-
 deli-

deliberari assignat prefat' Justic' dicti Domini Regis prius nominat' per manus suas propere deliberaver' Indictament' predict' hic in Cur' de Recordo in formam Juris terminand', &c. super quo ad istam eandem deliberationem Goale dicti Domini Regis de Newgate teni' per Civitat' predict' apud Justice-Hall predict' dicto die Jovis duodecimo die Julij anno tricesimo quinto supradict' coram prefat' Justic' ult' nominat' ven' pred' Thomas Walcott sub Custod' Dudlei North Mil' & Petri Rich' Ar' Vicecom' Civitat' predict' (in quorum Custod' ex causa & predicta preantea Commiss' fuit) ad Barram hic duct' in propria persona sua qui committitur prefat' Vic' Civitat' London, &c. & statim de premissis predict' in Indictament' predict' specificat' et superius imposit' allocut' qualiter se vellet inde acquietari. Idem Thomam Walcott dicit quod ipse non est inde culpabil' & inde de bono & malo pon' se super Patriam Ideo immediate ven' inde Jur', &c. Coram prefat' Justic' ult' nominat' hic &c. & Jur' Jure illius per prefat' Vic' ad hoc impannelat' scilicet &c. exact' vener' qui ad veritatem de premissis dicend' elect' tria & jurat' dicunt super sacrament' suum quod predictus Tho. Walcott est culpabil' de ali' prodicion' predict' in Indictament' predict' specificat' et superius imposit' modo & forma prout per Indictament' predict' superius versus eam supponitur & quod idem Thomas Walcott nulla habuit bona seu catalla terrar' sue tenementa ad eorum noticiam & super hoc statim quesit' est de prefat' Tho. Walcott si quod pro se habeat vel dicere sciat quare Cur' dicti Domini Regis hic ad iudicium & executionem de eo super veredict' predict' procedere non debeat qui nihil ulterius dicit preterquam ut prius dixerat super quo visis & per Cur' hic plene intellectis omnibus & singulis premissis considerat' est per Cur' hic quod pred' Tho. Walcott ducatur ad Goalam dicti Domini Regis de Newgate unde venit & ibidem super Bigam ponatur & abinde usque ad furcas de Tyburn trahatur & ibidem per Collum suspendatur & vivens ad terram prosternatur & quod secreta membra ejus amputentur & interiora sua extra ventrem suum capiantur & in ignem ponantur & ibidem comburentur & quod caput ejus amputetur quodque corpus ejus in quatuor partes dividatur ill' ponantur ubi Dominus Rex ea assignare voluit, &c. per quod precept' fuit Vic' quod caperent eum si &c. ad satisfaciend' &c. & modo scilicet die Jovis prox' post mensem Pasche isto eodem Termino coram Domino Rege nunc apud Westm' ven' quidem Johannes Walcott filius & heres predict' Thomae Walcott defuncti de alta prodicione predict' convict' & attinct' per Benedict' Browne Attornat' suum & habit' audit' Record' predict' super quo pred' Thomas convict' & attinct' existit' dicit quod in Record' & Process' predict' ac etiam in redditione Judicii predict' manifeste est Errat' in hoc vid' quod apparet' per Record' predict' quod Judicium reddit' est pro dicto Domino nuper Rege ubi per leges hujus Regni Angliæ Judicium predict' pro dicto Thoma Walcott reddi debuisset & in eo manifeste est errat' erratum est etiam in hoc, viz. quod Crimina in & per Indictamentum predict' versus predict' Thoma imposit' per Leges hujus Regni Angliæ incerte dubie & nimis generaliter allegat' existunt quodque idem Indictamentum supposit' & eidem Thomae oneratur & imponit crimina diversimoda & toto genere inter se discrepantia Quodque Judicium superinde reddit' sit & existit' contrarium

Legibus Angliæ & minime pronuntiand' vel imponend' pro vel super
hujusmodi Crimina qual' in Indictamentum predict' supponuntur &
in eo manifeste est Errat' unde Pet' Judicium Cur' hic in premis' &
quod Judic' & Attinctur' predict' ab Error' predict' & al' in Recordo
& Process' predict' comperi' existent' reversetur adnulletur & penitus
pro nullo habeatur & quod ipse predict' Johannes Walcott filius &
heres predict' Thomæ ad omnia que ipse pred' Johannes occasione
Judicij & Attinctur' predict' amisit restituatur & quod Cur' hic
procedat ad examinationem tam Record' & Process' predict' quam ma-
terias superius pro Error' assign', &c. & quia Cur' dicti Domini Re-
gis hic de Judicio suo de & super premis' reddend' nondum advisa-
tur dies inde dat' est prefat' Johanni Walcott in statuto quo tunc
&c. in Cr' Sanctæ Trinitat' coram Domino Rege ubicunque, &c. de
Judicio suo inde audiend' &c. ad quod quidem Crm' Sanctæ Trinitat'
coram Domino Rege apud Westm' ven' predictus Johannes Walcott
per Attornat' suum predict' & ut prius Petit' Judicium & quod Judi-
cium & Attinatur' predict' versus predict' Thomam Walcott reddit'
ab Error' predict' & al' in Recordo & Process' predict' comperi' & ex-
istent' reversetur adnulletur & penitus pro nullo habeatur & quod ipse
predict' Johannes Walcott filius & heres predict' Thomæ ad omnia
que ipse idem Johannes occasione Judicij & Attinatur' predict' amisit
restituatur & quod Cur' hic procedat ad examinationem tam Record' &
Process' predict' quam Materialiarum superius pro Error' assign' &c.
And after many Continuances, 'tis entred thus: Super quo Vis. et
per Cur' hic intellectis omnibus et singulis premis' diligenterque exa-
minat' Record' et Process' predict' et Err' per predict' Johannem Wal-
cott superius assign' et al' in Record' et Process' predict' comperi' ex-
istent' Maturaque deliberatione inde prius habita considerat' est quod
Judicium predict' ab Error' predict' et al' in Record' et Process' predict'
comperi' existent' revocetur adnulletur et penitus pro nullo habeatur
et quod predict' Johannes Walcott filius et heres predicti Thomæ
Walcott ad omnia que ipse occasione Judicij et Attinctur' predict' ami-
sit restituatur et quod predict' Johannes Walcott eat inde sine die, &c.
Et super hoc Johannes Trevor Miles Attorn' Domini Regis nunc Ge-
neral' qui pro eodem Domino Rege in hac parte sequitur coram
coram Rege ac Proceribus hujus Regni Angliæ hoc predicto Parlia-
mento apud Westm' in Com' Middlesex assemblat' in propria persona
sua ven' et dicit quod in Record' et Process' ac etiam in reddi-
tione Judicij super predict' priori Brevi dicti Domini Regis de Erro-
re corrigend' per predict' Johannem Walcott prosecus' pro revocatione
et adnullatione Judicij predict' versus predict' Thomam Walcott super
Indictamentum predict' pro alta proditiōe predict' reddit' manifeste
est Erratum in hoc, viz. quod ubi per Recordum predict' supponitur
quod predict' Johannes Walcott posuit loco suo quendam Benedict'
Browne Attornat' suum ad proseguend' predict' primum Breve de Er-
rore in et super Indictament' predict' pro alta proditiōe predict' quod
tamen Benedict' Browne nullum habuit Warrant' Attorn' pro eodem
Johanne Walcott de Record' affilat' ideo in eo manifeste est Errat'
Errat' est etiam in hoc, viz. quod Record' predict' apparet quod Ju-
dicium predict' pro revocatione et adnullatione Judicij predict' versus
predict'

predict' Thomam Walcott in forma predict' reddit' redditum fuit pro predict' Johanne Walcott versus dict' Dominum Regem ubi per Legem terre hujus Regni Angliæ Judicium ill' reddi debuisset pro dicto Domino Rege versus eundem Johannem Ideo in eo scil. manifeste est Error et hoc parat' est verificare unde pet' Judicium et quod Judic' ill' ab Error predict' et al' in Record' et Process' predict' existen' revocetur annulletur et penitus pro nullo habeatur et quod dictus Dominus Rex ad que omnia ipse occasione revocation' et annulation' Judicij predict' amisit restitnatur, &c.

It was argued on behalf of the King, That there was no Warrant of Attorney filed, and consequently the Reversal was not regular; for default of an Appearance by the Heir, who prosecuted the Writ of Error; and that there was no Day given to the Attorney General; nor was the Attorney General, or the Patentee, a Party to the Record, nor any Plea or Answer made by either of them to the Assignment of the Errors.

To this it was answered, That by the Common Practice in the Crown-Office, no Warrants of Attorney are filed, neither for Defendants upon Indictments, nor for Plaintiffs in the Writ of Error; that it had not been known, within the Memory of any Man living, that such Warrants were ever filed: That there need no day to be given to the King, or the Attorney General, for that the King's Attorney was supposed always present in Court, and the King cannot be Non-suited, because he cannot be called. That there never was any Answer to the Assignment of Errors in such Cases; That in Capital Cases there needs no joyning of Issue upon pleading *Not Guilty*.

Then it was argued, That there was no Error to warrant the Reversal to the Attainder; that the Exception taken to the Judgment was trivial and frivolous; that *ipso vivente* was not of necessity to be inserted; that never any Judge was known to require that the Man's Bowels should be burnt while he was alive; that the same was impossible to be executed; that the Law never appointed any Judgment for Treason, as essential, besides Drawing and Hanging; and that Quartering has been so long used, as to be accounted part of the Judgment, yet 'tis not necessary to make a good Judgment; and if that be so, no more is needful than Drawing, Hanging, and Quartering; that Ancient Presidents were thus short; *Rot' Parliament' 3 Hen. 5. p. 1. n. 6. Thomas de Gray & al' had been Attainted of Treason upon a Special Commission at Southampton, and the Record of the Attainder removed into Parliament, 3 Hen. 5. and the Judgment was good, Thomas de Gray ut proditor Domini Regis & Regni sui Angliæ, distrabatur suspendatur & decapitetur: And in the Records, Penes Thes. & Camar' Scacc' 3 Hen. 7. f. 10. a. 'tis detrabatur & suspendatur. And many other there are in that place to the same effect, and in the same manner, Glanvil. lib. 3. cap. 12. & Fleta cap. 16. And there is the Case of David Prince of Wales, who was Drawn, Hang'd, Beheaded,*

Beheaded, Dismembred and Burnt, *Britton de Treason, cap. 8. p. 16.* Drawing and Death is the Punishment of Treason, & *des Appelles, c. 22. p. 43.* to the same effect; & *Lib. Assis. 30 Edw. 3. pl. 19.* and abundance of Records were cited as found in the Exchequer, and nothing mentioned in them but *detrahatur & suspend.* And then was cited *Rot. Parl. 2 Hen. 6. n. 18.* and the Book *1 Hen. 6. 5. 19 Hen. 6. 103. and 1 Hen. 7. 24. Bro. Coron. 129.* there is a Judgment against *Humphry Stafford per omnes Justiciar Angliæ, quod iterum ducatur turri & abinde ponatur super herdillum et trahatur per London ad Tyburn ibidem suspendatur et ante mortem corda scindantur et caput scindatur et Corpus ejus dividatur in quatuor partes et mittentur ad voluntatem Domini Regis.* Earl of Essex's Case, Moore's Rep. and Owen's Case in *1 Roll's Rep.* have not this inserted. And *Stamford*, who was a Judge in *1 et 2 Phil. et Mar. says. c. 19. p. 128.* only *en son view*: And *Alexander Burnett*, who was convicted of Treason for taking Romish Orders at the Old Baily, *26 Car. 2. Rot. 56.* had no such Judgment; *Coker's Case* for the like Offence, *31 Car. 2. Rot. 239.* *William Marshall* *31 Car. 2. Rot. 240.* And *Mr. John Hampden* had the like Judgment as *Burnett*, &c. *1 Jac. 2.* upon confessing an Indictment of the same kind with *Walcott's*. Whereupon, considering that many Presidents were without this, and that the Essential Parts of the Punishment were in this Judgment, 'twas prayed that the Judgment of Reversal might be Reversed, and the Attainder confirmed.

On the other side it was argued, That the Original Judgment was Erroneous, and the Reversal just. And first it was observed, That this Writ of Error was new and particular, *ex gravi querela* of the Countess of Roscommon, who had nothing to do with the Record, was a meer stranger to it, and yet 'tis suggested that the Reversal was to her Damage.

Then 'twas urged that there was an Error in the first Judgment, for that the Judgment, in Case of Treason, is by the Common Law, and that it is and must be certain, and not at the pleasure of the Court which pronounces and gives it: That it ought to be severe, because 'tis a Punishment for the greatest Offence which can be committed, *Crimen lese Majestatis*, a Sin of the first Magnitude, an Offence which imports Treachery to the Prince, Enmity to the Country, Defiance to all Government, a Design to overthrow and confound all Order and Property, and even the Community it self; and in its Consequence occasions the Practise of all other Crimes whatsoever, as Murders, Burglaries, Robberies, &c. and therefore our Constitution hath imposed upon it a severe and cruel Judgment, such as the *English* do allow or permit in no other Case; the greatest of other Crimes incur Death only; but for Treason the Judgment is different. *Sir Tho. Smith's Treatise de Republica Anglic. 198.* there ought in reason to be a proportion between the Offence and the Punishment; and as this is the greatest, so the Penalty is *morte multa atrocior*; and in *Fleta lib. 1. p. 21.*

'tis *cum aggravatione pene corporalis*, somewhat more than Death. Then this being a Common Law Punishment, and not prescribed by any Statute, the knowledge of it must be fetcht from our Law-Books, and from Presidents; for the General Practise of the Realm, is the Common Law; 'tis describ'd with an *ipso vivente*, in *Smith's Republica Anglic.* p. 28. lat. Edit. pag. 245. *Stamf.* 182. *ex son view* which is tantamount; and *Stamford* wrote 2 *Eltz.* In *Coke's 3 Inst.* 210. 'tis *ipsoque vivente comburentur*, *Pulton de Pace Regni* 224. and many other Books were cited to the same effect: And 'twas affirmed that there was no Book, which recited the Judgment at large, but had this Particular in it. Several Books do in short put it, That for Treason the Party shall be Drawn and Hanged and Quartered, but those are only Hints of the Chief Parts, not Recitals of the Judgment it self. In the *English Book of Judgments*, printed 1655. pag. 292. 'tis mentioned particularly as the *Kings Bench* have adjudged it should be. The Duke of *Buckingham's* was so, 13 *Hen. 8.* *Stow's Chronicle* 513. shews that he was the Person. Then 'twas said, they have been thus in every Age without interruption, 'till 26 *Car. 2.* *Hamfrey Stafford's Case* 1 *H.* 7. 24. which was *per consensum omnium Justiciariorum*, tho' quoted on the other side as shortly stated in the *Year-Book*; yet on the Roll, which hath been seen and perused, 'tis with an *ipso vivente*: *Plowden* 387. and *Rastal's Entries* 645. the same Case, is thus: *Coke's Ent.* 699. is so likewise: *John Littleton* in 43 *Eltz.* *Coke's Ent.* 422, 423, and 386. is so. In the *Lord Stafford's Case*, 33 *Car. 2.* by the Direction of this House, and with the Advice of all the Judges, was the Judgment so given by the Earl of *Nottingham* then Lord High Steward. In the *Lord Preston's Case* 'tis so, which was drawn by Advice of the then Attorney and Solicitor, the present Keeper and Chief Justice of the *Common Pleas*.

As to the Objection, That *vivens prostratur* doth imply it, and that's enough. It was answered, That *ipso vivente comburentur* implies both, but not *e contra*; and all the Presidents shew the latter to be requisite. And as to the Case of *David Prince of Wales* mentioned in *Fleta*, there's only a Relation of what was the Execution, not of what was the Judgment. And *Coke 2 Inst.* 195. says, That the Judgment was in Parliament, and therefore the same can be no President to this purpose; and any one that runs over *Cotton's Records*, will find the Judgments in Parliament to be different, as the Nature of the Case required. No Argument can be drawn from the Acts of the Legislature to govern Judiciary Proceedings; however, *John Hall's Case* 1 *Hen. 4. Cott.* 401. is as now contended for. Before the 1 *Hen. 7.* there were some Erroneous Attainders; and the 29 *Eltz.* takes notice of them as so erroneous. The Judgments against *Benson* and *Sir Andrew Halsey* (cited below) are plainly erroneous; they dispose of the Quarters, which they ought not, but leave the same to the King's pleasure. *Sir Andrew's* President is a monstrous arbitrary Command by Writ to Commissioners of *Oyer and Terminer*, ordering them

to Examine him, and to give Judgment in manner as in the Writ is directed, that therefore is not to be justified; and 'twas before 25 *Edw. 3.* *Henry Ropers* 21 *Rich. 2.* doth dispose of the Quarters, and hath other Errors in it; and so have *William Bathurst's* and *Henry South's*, which were in 3 *Hen. 4.* But from that time to 26 *Car. 2.* there's none which do omit it. The four Presidents at the *Old Baily* were against Popish Priests, and what private politick Reasons or Commands might occasion the omission, is unknown; and *Hampden* was not Executed, but his Judgment was upon a Confession, and his Life saved, the reason of which is also unknown: So that there have been none Executed upon such Erroneous Judgments: And that there are no more Presidents, with the Omission, is a good Argument, that those many which have this Particular in them, are good and legal; the constant Current having been this way, proves the same to be the Common Law. And this is the most severe part of the Punishment, to have his Bowels cut out while alive, and therefore not to be omitted. As to the Earl of *Essex's* Case in *Moore*, and *Owen's* Case in *Roll's Rep.* the first is only a Report of the Case, and the last a descant upon the Judgment, but neither do pretend to recite the whole Judgment.

Then, to pretend that this Judgment cannot be Executed, is to arraign the Wisdom and Knowledge of all the Judges and Kings Counsel in all Reigns: And Tradition saith that *Harrison*, one of the Regicides, did mount himself, and give the Executioner a Box on the Ear after his Body was opened, &c.

Then 'twas argued, That if it be a necessary part of the Judgment, and be omitted, it is a fatal Error, and doth undoubtedly in all Cases give a good reason for the Reversal of such Judgment, as in the Common Case of Debt, where *dampna* are omitted in the Judgment, tho' for the Advantage of the Defendant, as is *Beecher's* Case, and *Telv. 107.* Besides, if this be legal, then all those Attainers, in which this Particular is inserted, must be illegal; for 'tis impossible that both the Judgments should be right; for either those are more severe than they should be, or this is more remiss. To say, that 'tis discretionary, is to give the Judges a power, which they themselves have disclaimed; and to Reverse this Reversal, is to tell the Court of *Kings Bench*, that they are not obliged to follow the General Practise of their Predecessors; that they are obliged to no form in their Judgment for Treason; that nothing but Death, and being Drawn to it, are essential; and according to that Doctrine, a Woman might receive the Judgment of Quartering, and a Man might be Burnt, and both according to Law. But the Constitution of this Kingdom hath prescribed and fixed Rules and Forms, which the Executive Power is obliged and bound to follow; that as nothing can be made or construed to be an Offence at the Pleasure of the Court, so no Judgment can be given for any known Offence at Pleasure. But the Law, either Statute or Common, hath established what is an Offence,

fence, and what is its Punishment; and there is nothing of Arbitrary Power allowed in respect of either. Wherefore upon the whole it was prayed, that the Reversal might be affirmed, and it was affirmed accordingly.

Sir Evan Lloyd Baronet, and Dame Mary his Wife, and Sidney Godolphin Esq; and Susan his Wife, Appellants,

Versus

Sir Richard Carew Baronet an Infant, the Son and Heir of Sir John Carew Baronet deceased, Respondent.

Appeal from a Decree of Dismission in Chancery. The Case was thus; Rice Tannott died seized in Fee of several Lands in the several Counties of Salop, Denbigh, and Montgomery, leaving three Daughters and Coheirs, Mary, Penelope, and Susan. Susan married Sidney Godolphin, one of the present Appellants. In July 1674. Mary and Penelope, in consideration of 4000 l. paid to the said Mary by Richard Carew Esq; and in consideration of a Marriage to be had, and which was afterwards had, between Penelope and the said Richard Carew, by Lease and Release, convey all those their two Parts of the said Lands in Denbigh, Salop, and Montgomery, to Trustees and their Heirs, to the use of Richard Carew for Life, then to Penelope for Life for her Jointure, then to the said Trustees and their Heirs, during the Lives of Richard and Penelope, to preserve contingent Remainders; then to the first and other Sons of Richard and Penelope in Tail-Male successively; And in default of Issue-Male, to the Daughters of Richard and Penelope in Tail: And in default of such Issue, as to one Moiety of the said two Parts to the first and other Sons of the said Penelope by any other Husband in Tail, the Remainder of all and singular the Premises to the said Richard Carew and his Heirs for ever, subject to this Proviso, That if it should happen that no Issue of the said Richard, upon the Body of the said Penelope, should be living at the decease of the Survivor of them, and the Heirs of the said Penelope should within Twelve Months after the decease of the Survivor of the said Richard and Penelope dying without Issue as aforesaid, pay to the Heirs or Assigns of the said Richard Carew the Sum of 4000 l. that then the Remainder in Fee-simple so limited, to the said Richard Carew and his Heirs should cease; and that then, and from thenceforth, the Premises should remain to the use of the right Heirs of the said Penelope for ever.

After this Mary intermarried with the Appellant Sir Evan Lloyd, and a Partition was made of the Premises, and the same had been enjoyed accordingly ever since, and Mr. Carew and his Lady levied a Fine to Mr. Godolphin and his Lady of his part; who did

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thereupon by their Deed dated 23 Sept. 1676. covenant to levy a Fine of Mr. Carew's two Parts, to such uses as he and his Lady should limit and appoint, but have not yet devised the said Fine.

Richard Carew and Penelope his Wife, to avoid all Controversies that might happen, whereby the Estate of the said Richard Carew, or his Heirs, might be question'd or incumbered by the Heirs of Penelope; and to the End to extinguish and destroy and barr all such Estate, Right, Title, Equitable or other Interest, as the said Penelope then had, or her Issue and Heirs might have or claim to the same, by any Power, Settlement, or Condition, on payment of 4000 *l.* or otherwise, to the Heirs of Richard Carew, by the Heirs of the said Penelope; and for the settling of the same on the said Richard Carew and his Heirs, did in Michaelmas Term 1681. levy a Fine of the Share and Part allotted to them, and by Deed of 10 Decemb. 1681. declare that the said Fine should be to the use of the said Richard for Life, Remainder to Penelope for Life, the Remainder to the said Richard Carew his Heirs and Assigns for ever: And do further declare, That the Fine agreed to be levied by the Appellants Sidney Godolphin and Susan his Wife, by their Deed dated the 23 Sept. 1676. should be to the same uses, and then direct the Trustees by the first Settlement to convey to those uses.

Penelope died without Issue in 1690. Richard Carew made his Will in Aug. 1691. and devised the said Lands to Sir John Carew Baronet, his Brother, subject to pay all his Debts and Legacies, and made Sir John Carew his Executor.

In Decemb. 1691. Richard Carew died without Issue, and Sir John Carew entred, and was seized and possessed of the Premises, and paid 4855 *l.* for the Debts of Richard Carew.

Sir John Carew died, and the Respondent, Sir Richard Carew an Infant, is his Son, Heir, and Executor.

The Appellants, Mary and Susan, claiming the Lands as Heirs to Penelope, by virtue of the said Proviso in the first Settlement, upon payment of the 4000 *l.* exhibited their Bill in Chancery to compel the Trustees to convey the Estate to them upon such payment.

Upon hearing of this Cause on Bill and Answer, the Court ordered a State of the Case to be drawn, which was as above; and afterwards the Court, assisted by the Chief Justice of the Common Pleas, and Mr. Justice Rookby, seeing no Cause to relieve the Plaintiffs dismissed their Bill.

And now it was argued on behalf of the Appellants, That such Dismission ought to be set aside; and amongst other things, it was insisted on in favour of the Appeal, that this Proviso was not void; that it was within the reason of the Contingent Limitations allowed by the late Lord Chancellor Nottingham in the Case of the Duke of Norfolk; and there were quoted several Paragraphs in the Argument made by the said Lord Chancellor, as that

that future Interests, springing Trusts; or Trusts Executory, Remainders that are to emerge or arise upon Contingency, are quite out of the Rules and Reasons of Perpetuities; nay, out of the Reason, upon which the Policy of the Law is founded in those Cases, especially if they be not of remote or long Consideration, but such as by a natural and easie Interpretation will speedily wear out, and so things come to the right Channel again: That tho' there can be no Remainders limited after a Fee-simple, yet there may be a Contingent Fee-simple arise out of the first Fee; that the *ultimum quod sit*, or the utmost Limitation of a Fee upon a Fee is not yet plainly determined; that tho' it be impossible to limit a Remainder of a Fee upon a Fee, yet 'tis not impossible to limit a Contingent Fee upon a Fee; that no Conveyance is ever to be set aside in *Chancery*, where it can be supported by a reasonable Construction, especially where 'tis a Family Settlement. Then these Paragraphs were applied; and further urged, That there could not in reason be any difference between a Contingency to happen during Life or Lives, or within one year afterwards; that the true reason of such Opinions which allowed them, if happening within the time of the Parties lives, or upon their deceases, was because no Inconvenience could be apprehended thereby; and the same Reason will hold to one year afterwards; and the true Rule is to fix Limits and Boundaries to such Limitations, when so made, as that they prove Inconvenient, and not otherwise: That this Limitation upon this Contingency happening, was the considerate Intention of the Family, the Circumstances whereof required Consideration, and this Settlement was the Result of it, and made by good Advice: That the Fine could not barr the Benefit of this Proviso; for that the same never was, nor ever could be in *Penelope*, who levied the Fine.

As to the Pretence, That if the Appellants were relieved, *Richard Carew* who married *Penelope*, would have no Portion with her. 'Twas answered, That that could not alter the Case; the Agreement and Intention of the Parties being the most considerable Matter; and besides, *Richard* enjoyed the Estate during his Life without impeachment of Waste. And as to the Debts, 'twas answered, That those were no Ingredients in the Question; however there would be 4000 *l.* paid towards it, and the Personal Estate was more than enough to pay the residue. For which, and other Reasons, 'twas prayed that the Dismission might be Reversed.

On the other side it was insisted on with the Decree, 1. That the Limitation by the Settlement in July 1674. to the Heirs of *Penelope*, upon payment of 4000 *l.* by them to the Heirs of *Richard Carew*, within Twelve Months after the death of *Richard* and *Penelope*, without Issue, at the time of the decease of the Survivor of them, is a void Limitation, the Fee-simple being before limited to *Richard* and his Heirs, and so not capable of a

further Limitation, unless upon a Contingency to happen in the Life of one or more Persons in being, at the time of the Settlement; which is the furthest that the Judges have ever yet gone, in allowing these Contingent Limitations upon a Fee; and which were the Bounds set to these Limitations by the late Lord Chancellor *Nottingham*, in the Case of the Duke of *Norfolk*; that tho' there were such Expressions as had been read on the other side, yet the Bounds set by him to these Limitations, were only dependent upon Life or Lives in being, and never as yet went any further: And if they should be Extended, and allowed to be good upon Contingencies to happen within Twelve Months after the Death of one or more Persons, they may be as well allowed upon Contingencies to happen within a Thousand years; by which all the Mischiefs, that are the necessary Consequents of Perpetuities, which have been so industriously avoided in all Ages, will be let in; and the Owner of a Fee-simple thus clogged, would be no more capable of providing for the Necessities and Accidents of his Family, than a bare Tenant for Life.

2. If this Limitation were good, 'twas urged, That the Estate limited to the Heirs of *Penelope* was virtually in her, and her Heirs must claim by Descent from her, and not as Purchasers; and by Consequence this Estate is effectually barred by the Fine of *Penelope*: the design of limiting this Power to the Heirs, not being to exclude the Ancestor; but because the Power could not in its nature be executed until after the decease of the Ancestor, it being to take effect upon a Contingency, that could not happen till after that time; and this Bill and Appeal was not only to have the said *Richard Carew*, who married *Penelope*, to have not one Farthing Portion with his Wife, but to make the now Respondent *Sir Richard Carew*, to lose the 4855*l*. which his Father *Sir John Carew* paid, as charged on the Lands in question. For which Reasons, and many others well urged about the Mischief and Danger of Perpetuities, and their Increase of late years, to the intangling and ruine of many Families, it was prayed that the Decree of Dismission might be affirmed, but the same was Reversed.

Sir William Morley Knight of the Bath, Plaintiff;

Versus

Peter Jones Defendant.

WRit of Error to Reverse a Judgment in B.R. in Ejectment upon the Demise of *Bellingham*, upon a Special Verdict, which finds, That *Anne Bowyer* Spinster, was seized in Fee of the Mannor of *Frensham*; that the said *Anne* and *Edward Morley* Esq. and *Sir William* and *J. Wells* ante tempus quo, &c. viz. 22 July 1664. did

did make, and as their Deed, deliver a certain Indenture with their Seals sealed, whereby the said *Anne* demises the Mannor aforesaid to Sir *William* and *Wells*, and their Executors, for one Month from the Day next before the Day of the Date; that Sir *W.* and *Wells* entred and were possessed; that they the 23^d of *July* in the said Year sealed, and as their Deed, delivered another Indenture with their Seals sealed, whereby the said *Anne*, reciting a Marriage intended between *Anne* and *Edward*; and that *Edward* had agreed to settle a Jointure out of his Lands to the value of 300 *l.* per Annum; and that the said *Anne* had agreed, in case the Marriage took effect, and a Jointure were made, as aforesaid, to settle the said Mannor on him and his Heirs, and to particular Trusts after-mentioned, until the same be performed. She the said *Anne*, in consideration of the Marriage, and in performance of the Agreement on her part, Bargains, Releases, and Confirms to Sir *W.* and *Wells* their Heirs, the said Mannor, and all her Right, &c. and the Reversion, &c. in Trust for the said *Anne* and her Heirs, until the Marriage take effect, and assurance of a Jointure be made as aforesaid; and after such Marriage and Assurance of such value as aforesaid, then to the use of *Edward* and his Heirs, &c.

Then the 1st of *August* 1664. a Marriage was had; then the 29th of *Jan.* 1665. a Deed is Executed between the said *Edward* and *Anne* of the first part, and *Young* and *Truster* as Trustees on the other part, reciting that a Fine is already acknowledged, and agreed to be levied in due Form of Law next *Hillary* Term, between the said *Young* and *Truster* Plaintiffs, and the said *Edward* and *Anne* his Wife, of the said Mannor of *Frencham*, and thereby declared that the said Fine should be to the use of *Edward* and his Heirs. Two days after the Execution of that Deed, and before the Fine levied, viz. 31 *Jan.* 1665. another Writing indented was made and executed under Seal, between the said *Edward* of the one part, and the said *Anne* of the other part, whereby they both, in Consideration of the said Marriage, and other good Causes, did Covenant, Consent, and Agree to revoke all former Grants, Bargains, Contracts, Writings, Covenants, and Obligations made or done between them, or any other for them; until the said *Edward* had performed the Agreements in the said Marriage Settlement on his part, both in Law and Equity; and that in default thereof, it might be lawful for the said *Anne* and her Heirs, to enter into the said Mannor and Land, conveyed by the said Settlement, without the lett of the said *Edward* and his Heirs.

Afterwards the Fine was levied, *Quibus Purificationis*, which was the 9th of *February* in that Term: And afterwards by Indenture between the said *Edward Morley* of the one part, and one *Henry Doble* of the other part, dated 9 *July* 1666. the said *Edward* in consideration of 600 *l.* Mortgages the said Mannor to *Doble* and his Heirs: Then the Money not being paid by *Edward Morley* to *Doble*, *Doble* did 2 *June* 1676. in consideration of 600 *l.* with Interest, paid by Sir *William Morley*, conveys the said Mannor to one *Thomas Young*; that *Edward Morley* did never convey the

the Lands agreed to be conveyed for a Joynture to the value of 300 *l. per Annum*, but did settle and convey only part, which was of the value of 250 *l. per Annum*, and no more, and that subject and liable to the payment of 15 *l.* yearly for ever to a Stranger. The said *Anne* dies without Issue, and *Henry Bellingham* was Co-fin and next Heir, *Et si, &c.* And Judgment was given in *B. R. pro quer.*

It was argued on the behalf of Sir *William Morley*, That this Judgment was Erroneous; that the first Deed, and the Matter of the Joynture was nothing in the Case; that the Question was, to what uses the Fine was levied; that the Deed executed under Seal between *Edward* and *Anne*, and the Trustees, did effectually declare the uses of this Fine, and that the second Instrument cannot be made use of, as a Deed, to controul the former; that the first was fairly made, and all Parties requisite concurring to it. And that of the 31 *Jan.* was not a Deed; for a Man cannot make a Deed to his Wife, or to himself; this cannot be construed a Deed-Poll, when 'tis Indented; for that is to construe a thing different from what it is: Intent may be construed, but one Thing or sort of Instrument can never be taken for another. Then supposing it a Deed-Poll, it doth not revoke, it takes no notice of the Fine or the Deed; it hath no reference to either of them; it says that all Agreements are to be void; but how? 'tis not absolutely; only till a particular Thing be done: So that 'tis not a Revocation, so as to annul the Deed of the 29th: and the Husband by this neither did, nor could direct the use of the Fine to be to the Wife. Suppose that before the Statute of Uses, a Man had declared an Use to his Wife, it was no Trust or Use, for that no *Subpena* lay at the Instance of the Wife against the Husband. A Man could not be a Trustee for his Wife. Now no Use can be Executed by the Statute, but where a *Subpena* did lye before the Statute to compel the Injoyment according to it: And therefore 'tis, that a Corporation could not be seized to an Use, because no *Subpena*; and no *Subpena*, because no Attachment lay against a Body Corporate. Suppose the last Deed to be any thing, 'tis only a Parol Evidence, and that will not Revoke the first Deed.

Then here's no Variance between the Fine and the Deed of the 29th: The Deed says a Fine is already acknowledg'd, and to be levied the next *Hillary* Term, between the same Parties, and of the same Lands: This is either the next *Hillary* Term after the Conu-
 fance of the Fine, or after the Deed: Then 'tis not usual to acknowledge a Fine, and levy it an Year after; 'tis not allowable in Practice, and therefore 'tis not to be so Expounded; for Men are to be intended to act reasonably, and according to Common Usage. Now 'tis true, it doth not appear when the Caption was, whether in or before the Term; yet common Intendment must carry it, that the Caption was before the Term, and so 'twas to be a Fine of that Term, or to be in or before the next *Hillary*; the Parties designed not, the Fine should lye for one whole Year:

If it had been in or before, it had been well enough ; then, tho' those words are not in, it is plain that the Intent was so : The Earl of *Rutland's* Case, was upon Evidence, and not upon Pleading. If levied before the time, that is well ; the next *Hillary* Term, is no more, then on or before ; or in *Hillary* next at the furthest, or by *Hillary* Term next : These all do sound much to the same purpose in common Understanding. The End of a good Construction is to supply the Defects of Expression ; Then taking it for the next *Hillary* Term after that Term. If I do a thing before the time, 'tis done in pursuance of the Intent ; for the Day given is for the Advantage of the Party who hath Liberty given to forbear the Act during all that space, till the last Day of the time given ; but if he doth it sooner, the End is fulfilled ; so Payment before is always reckoned as Payment at the Day : And 'tis so in all Cases, where the Time is not in the most considerable part of the Agreement, as in Harvest, in Winter, or the like ; and the Nature of the Act is such, that 'tis most convenient for the Obligee or Covenantor to have it at that Season, and not before : In the Earl of *Rutland's* Case, 'tis agreed if within the time, 'tis good. Will any Man say that this is not the Fine which was meant ? If a Covenant be to make a Feoffment in *Trinity* Term next, such a Feoffment before fulfils the Covenant: This is not a Fine acknowledg'd by any other Parties, of any other Lands, or upon any other Agreement. Suppose a Man had a power of Revocation by Deed under Seal with Witnesses, and had covenanted in such manner to levy a Fine before this Day Twelve-month, and before the Day he had levied a Fine ; now the Deed was no Revocation, because not Express, and of it self made no Alteration in the Estate ; and the Fine of it self was not, because not by Deed attested ; but both together make a Revocation ; they are but one Conveyance, as was adjudged in the two Cases of *Wigson* and *Garret*, and *Herring* and *Brown* ; Should not this have been a Revocation ? Either this first was designed to deceive the Wife, or the second was designed to deceive Creditors and Mortgagees ; the Creditor is to be preferred. Suppose the first were made, as 'tis most likely to enable him to borrow Money, 'twould be hard to construe the second good : Would any Purchaser have doubted this Title, if he had seen the Fine and this Deed of the 29th ? To allow this second, is to Countenance a Practise which may deceive any Man ; for a Deed precedent leading the Uses of a Fine, is binding, and concludes against any Thing but an intermediate Deed between that and the Fine ; and such private Agreement between Husband and Wife, may be had and pretended in any Case whatsoever. Then was cited *Havergill* and *Hare*, 2 *Rolls* 799. And 'twas further said, that against a Mortgagee the second will be void, according to *Proger's* Case, 1 *Sid.* 139. A Conveyance voluntary, that was good in its first Creation, may become void by subsequent Accidents ; and in truth it was admitted below, that this second Writing was no Deed, had no more efficacy than a Parol Averment ;

Averment ; and consequently the only Query can be, If this Fine be another, and different, from that which was meant and intended by the Deed of the 29th ; for if it be not, then Parol Averments or Agreements ought not to be admitted. Besides, this is but Evidence, nor proper for the Court to consider, and the Jury should have concluded specially, That if Parol Evidence, or a naked Averment should be admitted, then they find to such Uses : But here 'tis like finding the Badges of Fraud, without finding the Fraud it self, or a Demand and Denial, without finding a Conversion ; upon neither of which can the Court judge the Thing to be a Fraud or a Conversion. And for these and other like Reasons it was prayed, that the Judgment might be reversed.

It was argued on the other side with the Judgment, That this Fine thus levied was not to the use of the Husband ; but of the Wife and her Heirs ; that the Fine is not to the Uses in the Deed of the 29th, but controuled by that of the 31st. 'Twas agreed, that if there be a Deed to levy a Fine, and in pursuance thereof a Fine is levied, to the Person, of the Lands, and at the time, no Proof shall be allowed, that the Fine was to any other Use, but if it be in case of a subsequent Deed, then Averment may be against it ; but by the making of a precedent Deed, all Parties are estopped to contradict it, unless there be another Deed of equal Nature to controul that. Where the Deed is punctually observed, there's no liberty to aver the contrary ; but where 'tis not pursued, the Averment is consistent. Where it doth vary, yet if nothing doth appear to the contrary, there the fine shall be construed to be to the Uses of the Deed by construction of Law ; a Wife is bound by the Husband's Declaration ; and if the Fine be in pursuance of the Husband's Deed, 'tis as binding to her, as if she were a Party : An Infant cannot avoid a Fine, where there was a Deed agreeable, but by reversing it.

Then 'twas argued, That here was such a Variance as did allow of such Averment ; that 'tis true, the Deed of 29. had been a good Declaration of the Uses of this Fine, notwithstanding the Variance, if the Writing of 31. had not been made ; but there being a Variance, that is admissible ; that this Fine now found differs as much from that in the Deed, as if it had been levied at a time after ; that levying it before, makes it not the same. The Woman perhaps here did agree to levy a Fine at this distance of time, that she might in the mean while have a competent Provision out of her Husband's Estate for her Joynture, then when she levies this Fine at a different time, she doth not do it in pursuance of the first Deed. Then 1 Rep. 76, 99. 3 Bulstr. 231. 2 Rolls Abridg. 251. 2 Cro. 646. 2 Rolls Abridg. 799. Savil 124. 1 Leon. 210. 3 Cro. 210. 1 And. 240. were quoted, and either answered or applied to this Point of Variance.

Then 'twas said, That there was a difference between a Fine that varies from a precedent Deed, and a Fine that is followed with a subsequent Deed or Declaration of Uses. If there be a sub-

subsequent Declaration, the Heir at Law cannot aver that 'twas to the use of the Conusor and his Heirs, or to any other use then what is in the Deed; the Party himself, or his Heirs cannot aver it, but they are estopped by this Deed, tho' subsequent; however, a Stranger is at liberty to make such Averment: But if a Deed be precedent, and the Fine varies, and is not the same, there none are estopped, neither the Party himself, his Heir, nor a Stranger; because the Fine stands alone, without any Deed referring to it; and declaring the uses of it.

'Then 'twas urged, That this second Deed was sufficient to declare the uses of this Fine: If the use arise upon, or by transmutation of the Possession, as by Fine or Feoffment, 'tis sufficient without any Deed; the use arises only upon the Parties Declaration or Appointment: If without a transmutation of Possession, there must be some Agreement binding the Party upon some Consideration; for the use being founded in Equiry, the *Chancery* would never relieve, where there was no transmutation of Possession or Agreement upon Consideration; and if in Consideration of Blood, it must be by Deed, because the Consideration is not binding without it, *Moore's Rep. Callow and Callow*. If this Writing of 31. had expressly declared, that it should enure to the Husband and his Heirs upon such a Contingency, this had been a good original Declaration of the use, and would have altered the Estate, because of the transmutation of the Possession; and as 'tis now penned, 'tis a good Writing, sufficient to declare the uses of the Fine; any sort of Agreement, whereby the Parties intent appears, is sufficient; an use is an equitable thing; and if it appears to have been intended, that is enough, 2 *Leon. 14. Brent's Case*: any Agreement between the Party that hath the Estate, and him who is to have it, may raise an use in this Case: a Bargain and Sale of the Lands carries the use, tho' no mention of it: 8 *Rep. Fox's Case, Crossing and Scudamore*; In this Case there was an Agreement betwixt Husband and Wife, that he should have the Lands, if he made a Jointure. A Bargain and Sale, tho' not inrolled, a Charter of Feoffment without Livery, shall raise the use of a Fine levied between the same Parties; therefore this Writing is a good Appointment. But suppose it were not so of it self, 'tis sufficient to controul that of the 29th; for 'tis agreed thereby, that all Deeds shall be revoked; which shews plainly, that the Fine was not to be to the uses mentioned in that Deed, especially when it varies from it. A Parol Declaration of the Mind of the Party will be enough to controul and hinder the raising of an use by the Deed, and Fine where different; and if so, then the use here is to the Wife and her Heirs. Then supposing the Variance frivolous and immaterial, this Writing of the Husband and Wife is a good appointment; the Trustees or Conusees of the Fine need not to be Parties to the appointing or declaring of the uses: The Indenture precedent is but directory, and if there be another direction under Seal before the Fine, it must over-rule the first, Writing

ting of it self seems enough, 2 Cro. 29. 3 Cro. 571. But suppose an Indorment on the Indenture revoking one use, before the Fine be levied, would not that controul it? This is rather like a last Will, and the last before the Fine must stand. A Covenant to stand seized must have all the necessary Parts of a Deed, so as to have been obligatory in *Chancery* before the Statute; but a meer Declaration of uses need not be so formal: The use declared by the 29th was always revocable till the Fine was levied: and this is sufficient both to revoke the last Declaration, and to declare new uses; this amounts at least to a Deed-Poll, and therefore sufficient. They were cited *Moore* 22. 512. *Latch.* 139. and many other Authorities: And upon the whole 'twas prayed, that the Judgment should be affirmed; and it was affirmed.

Sir Edward Hungerford and John Hill Executors and Devisees of
Sir William Bassett deceased, Plaintiffs,

versus

Edward Nosworthy Defendant.

WRit of Error to Reverse a Judgment in B. R. upon a Special Verdict in Ejectment by *Hitchins* the Lessee of *Nosworthy*, against Sir William Bassett Defendant, for the Mannor of *Lanrock* and other Lands in *Cornwall*; wherein, upon Not Guilty pleaded, and a Trial at Bar, the Jury find, That Sir Henry Killebrew was seized in Fee of the Lands in question; and on the 12th of November 1644. made his Will in writing, which follows in these words, I Henry Killebrew, &c. and so they set forth the Will, whereby Sir Henry Killebrew devised the Premises to Mrs. Jane Berkley (his near Kinswoman) for Life; with Remainder over to Henry Killebrew, alias Hill (Sir Henry's Natural Son) in Tail, and makes Mrs. Berkley sole Executrix. They further find, that after the making of that Testament, and before the time when, &c. viz. about the Feast of St. Michael, in the Year 1645. *Condidit & fecit aliud Testamentum in scriptis, sed quid fuit content' in eodem ult' mentionat' Testamento, vel quale fuit purportum sive effectus inde, juratoribus præd' non constat.* And that Sir Henry on the 29th of September 1646. died seized of the said Lands; that Mrs. Jane Barkley, Devisee of the said Will, in 1644. by Lease and Release conveyed to Mr. Nosworthy's Father, and that the Father died in 1684. that Mr. Nosworthy is Son and Heir to him; that Sir William Bassett is Cousin and Heir to Sir Henry, viz. Son and Heir of Elizabeth Bassett, Daughter and Heir of Sir Joseph Killebrew, elder Brother of Sir Henry the Testator; that Nosworthy the Lessor of the Plaintiff, entred and made the Lease in the Declaration, &c. But upon the whole Matter, whether the Said Testament made

in writing 1645. was a Revocation in Law of the ſaid Devife of the ſaid Lands to Mrs. Berkley, they are ignorant, and pray the Judgment of the Court, *Et ſi*, And upon this Judgment was given for the Plaintiff in the Ejectment.

And now it was argued, That the Judgment was Erroneous; that this laſt Will could not be taken to be a duplicate of the former, but muſt be deemed a Revocation; that no Will is good but the laſt; that every Will is revokable till death; that the making of another, doth import a Revocation of all former ones, tho' it be not ſo expreſſly declared in writing; for it muſt be the laſt, or nothing; that this Conveyance by Will was anciently a Priviledge by the Civil Law, for People in *Extremis*, who had not the time or aſſiſtance neceſſary to make a formal Alienation, and chiefly intended for Military Men, who were always ſuppoſed to be under thoſe Circumſtances, and therefore the Ceremonies and number of Witneſſes required of others, were diſpenſed with, as to Soldiers; but now the Rules for Military Teſtaments, as they are called, are allowed in moſt Caſes; that as to Lands, by our Law, was a Priviledge only given to ſome Boroughs and Places within the Kingdom; and particular Cuſtom gave the liberty of diſpoſing Lands or Houſes by Will, and that by nuncupative Will or Parol without writing; ſo is *Bracton. lib. 4. fol. 272. Fleta lib. 5. cap. 5. Potest legari & catallum tam hereditas quam perquiſitum per Barones London & Burgenſes Oxon, 1 Inſt. 111.* that then came the Statute of *Hen. 8.* and impowers a Devife by a Man's laſt Will and Teſtament in writing; but ſtill 'tis by his laſt Will. And ſo is *Littleton ſect. 168.* If divers Wills, the latter ſhall ſtand, and the others are void, *1 Inſt. 112.* In truth 'tis plain Law, the firſt Grant and the laſt Teſtament. In *Swinb. 1 part, ſect. 5. p. 14.* no Man can die with two Wills, but he may with divers Codicils; and the latter doth not hinder the former, ſo long as they be not contrary. Another difference there is between Wills and Codicils: If two Teſtaments be found, and it can't be known, which is firſt or laſt, both are void; but the latter countermands the firſt, tho' there be a Clause in the firſt, that it ſhall not be revoked, and tho' an Oath were taken not to revoke; becauſe the Law is ſo, that the very making of a latter doth revoke the former: So is *Linwood's Provincial de Teſtamentis*; Juſtice *Dodderidge's Office of Executor*, publiſhed by *Wentworth 29.* A verbal Will revokes a former written Will, *Forſe and Hembling, 4 Rep. 60, 61. Plowd. 541. Perkins ſect. 178, 179. and ſect. 478.* The *2 Hen. 5. 8.* is full to this purpoſe. There's an Action by an Executor againſt two Executors, and they plead a Teſtament whereby they are made Executors; and the Plaintiff replies, that he afterwards made another and himſelf Executor, and held that by the ſecond the firſt became void. Now the meaning of theſe Books, cannot be, that a Will expreſſly revoking, is the only Will that can make a Revocation; not is it, that a Contrariety or Repugnance between the one and the other, is neceſſary to make a Revocation; for tho' there be no

new Will made, yet a Revocation may be by word of Mouth, as 2 Cro. 49. 115. 1 Cro. 51. 3 Cro. 781. nay, a void Bequest shall revoke a Will, so shall a Deed that hath no effect, as Feoffment without livery, a Devise to J.S. or to a Corporation, when there is no such, will do it; so that 'tis not the Contradiction between the disposal which revokes, for that which is no disposition at all will do it; wherefore the meaning of the Authors cited is somewhat else; and it can only be this, That there is somewhat particular in a Will, to that Instrument of Conveyance, more than to any other, that even the making of a new Will is a sufficient Revocation; the words are plain, by the making a new Will the former are all destroyed, for there can be but one last. And when a Man makes and declares a new Will, that new Will must be presumed to contain his whole Mind concerning the disposition of his Estate; declaring his Will imports thus much, and excludes all other. When a Man would alter part of his Will, there's a proper Instrument for it, called a Codicil, which is known in the Law as well as that of a Will: here's nothing found of a reference to the former: to judge it otherwise, would confound the use of Wills and Codicils, and the difference between them. 'Tis true, that a Man may make partial Wills of several parts of his Estate, and all may stand together; but then they must be declared to be Wills concerning particular things; and they are but several pieces of the same Will, tho' written in different Papers: but then in pleading one of them, you must not generally say he made *ult. voluntatem*, but *ultimam voluntat'* of such a thing; but here 'tis *aliud testamentum*, i.e. a general Testament. The 2 Rich. 3. fol. 3. is directly thus, The Defendant pleads one Will, the Plaintiff replies another, and exception taken, because he did not traverse the former, but held needless to do so, *quia per ult. testamentum ut placitatur generaliter, primum testamentum revocatur in omnibus*: and it cannot be pretended, that this might be the same Will written over again; for if so, it could not be *aliud*, it would be the same; these are not quibbles upon words; for can it be said, that this is a Devise by the last Will of Sir H. when there's another: Nor is it an Objection, that the Contents do not appear; for the Will belongs not to the Heir to keep, and consequently not to shew; in pleading he is not bound to a *profer*; 'tis enough that there was a subsequent Will. And as the latter may confirm or be consistent with the former, so it may not be so; and the consistency is not to be presumed, especially against an Heir at Law, and in possession. In the Case of Coward and Marshal, 3 Cro. 721. the Substance of both are declared, and thereby they appeared to be consistent, and consequently no Revocation: here *Eadem mens sic testandi*, the same intent of disposing his Estate the same way, can never be thought to continue, for then there had been no occasion of making another Will. If this be not a Revocation, 'tis an act void, and to no purpose, which is never to be intended. Then 'twas insisted on, That the bare act of making and publishing another Will, is a Revocation, and

and the finding of the Contents unknown is void : If this be not a Will, 'tis a Codicil, and that is contrary to the finding of the Jury ; for the Verdict mentions a second Substantive independent Will, without reference to the former ; which second Will is a Revocation : and therefore 'twas prayed that the Judgment should be reversed.

It was argued on the other side, in behalf of Mr. Nofworthy, That this was no Revocation ; that here had been a great stir about nothing, for that nothing appeared against his Title ; that a Man may make a Will of several things at several times, and they both shall stand ; that a deliberate Will being made, the Contents whereof are known, shall never be revoked by that which is not known : nothing can be judged upon that which doth not appear, and consequently it can never be judged to be a Revocation : Here's another Will, and nothing is given by it, nothing is found to be given by this subsequent Will. The form of entring the ancient Judgments was, *Quibus visis lectis & auditis & per Curiam plene intellectis*, now what is here read to make a Revocation. 2 Rich. 3. fol. 3. is with the Judgment, for there 'tis replied that he made another Executor ; there are the Contents pleaded, sufficient to maintain his Count, and answer the Defendant's Bar ; the Book is, *per hoc quod alius Executor nominatur*. Then was cited 1 Cro. 51. the Reason given is, *quia in dubiis non presumitur pro testamento*, and here being a good Will, at the most the other is doubtful. 1 Cro. 114, 115. Several Wills of several things may be made. And the same Book 595. 10 Car. 1. which Resolution Serjeant Maynard in arguing this Case below, said that he heard in that Court of Kings Bench : 'Tis the Subject Matter of the Wills and the Repugnancy which makes the Revocation. In this very Case, in the Exchequer, upon an English Bill, 'twas held by Hale to be no Revocation, 'tis in Hardres 375. Coke upon Littleton, which hath been quoted, Comments upon these words *several Devises*, and if there be no Devise in the second, there can be no sense or meaning in it, and consequently unless some meaning appear, it can never be an Evidence of a change of his Mind ; as it might be a Revocation, so it might be otherwise ; and he that will have it to be a Revocation, must prove it to be such : No Man can affirm that every Will must necessarily be a Revocation of a former, for the second Will might be of another thing, as Goods, or of another parcel of Land, or in confirmation of the former. If in these, and many other like Cases, a latter Will is no Revocation of a former, how can it possibly with justice be concluded, that a latter Will without Contents, Purport, or Effect, shall be a Revocation of a former. And tho' the Jury have in this Case believed the Witnesses, and found that another Will was made, it may be of dangerous Consequence to encourage and construe this a Revocation, without knowing the Contents ; for no Will can be secure against the swearing of a new Will, if there be no necessity of shewing it, or proving what it was. For which, and other Reasons, it was prayed that the Judgment might be affirmed, and it was affirmed.

Sir

Sir Simon Leach & al^s Plaintiffs,

Versus

J. Thomson Lessee of Charles Leach Defendants.

WRIT of Error to Reverse a Judgment given in B. R. upon a Special Verdict on a Trial at Bar in Ejectment brought by Thomson on the Demise of Charles Leach: the Special Verdict finds, that Nicholas Leach was seized of the Lands in question in his Demesne as of Fee; and being so seized 9 Nov. 19 Car. 2. he makes his last Will, and thereby devises the Premises to the Heirs Males of his Body lawfully to be begotten; and for default of such Issue, to Simon Leach his Brother for his Life, and after his Decease to the first Son of the Body of the said Simon lawfully to be begotten, and the Heirs Males of the Body of such first Son lawfully to be begotten; and for default of such Issue, to the second, &c. and so on to the eighth Sons, &c. of all and every other Sons, &c. and for default of such Issue, to Sir Simon Leach, his Kinsman, Son and Heir of Simon Leach of Cadley in Com^{ty} Devon^{sh} Esq. deceased, and the Heirs Males of his Body; and for default of such Issue, to the right Heirs of him the said Nicholas for ever.

Then they find, That the Lands in the Declaration, and those in the Will, are the same; that afterwards, viz. 10 Apr. 20 Car. 2. Nicholas died seized without Issue of his Body; that after his Death, the said Simon his Brother and Heir Entred, and was seized in his Demesne *ut de libero tenemento* for term of his Life, Remainder to the first Son of the Body of the said Simon the Brother, and the Heirs of the Body of such first Son lawfully to be begotten; and for default of such to the second, &c. Remainder to Sir Simon in Tail, Remainder to the said Simon the Brother, and his Heirs belonging.

That Simon Leach the Brother being so seized, afterwards viz. 20 Aug. 20 Car. 2. took to Wife Anne the Daughter of Unton Crook, that afterwards the 20 Aug. 25 Car. 2. he being so seized did Make, Seal, and as his Deed deliver a certain Writing, purporting a Surrender of the said Lands to the said Sir Simon Leach, which Writing was *prout*, &c. Then they find that the said Simon Leach the Brother, *non fuit compes mentis sue tempore confessionis, sigillationis, & deliberationis scripti illius*, &c. That afterwards, viz. 10 Nov. 25 Car. 2. the said Simon the Brother had Issue of his Body, on the Body of the said Anne his Wife Charles Leach; that the said Simon died, and Charles Leach the Lessor of the Plaintiff is eldest Son and Heir of the said Simon, &c. *Et si videbitur Cur^{ia} quad*, &c. Upon this Verdict there was Judgment for the Plaintiff.

And

And now it was argued, That the said Judgment was Erroneous ; and said that in the Case there were two Queries, 1. If this were a good Surrender, there being no Acceptance or Agreement by Sir Simon before the Birth of the first Son, Charles. But this was not insisted on before, and therefore waived here, the same having been adjudged by the Lords to be a good Surrender, even to an Infant without Acceptance, in another Action between the same Parties, which you may see reported in 2 Ventris. 198, 208. Then it was argued on the second Query, That the Lessor of the Plaintiff in the Ejectment, being a Remainder Man in Tail, cannot take any Advantage of his Father's Lunacy : That in this Case he could claim no Title, as Heir at Law, to his Father or Uncle, because of the intermediate Remainder to the Defendant in Tail ; so that *quoad* this Estate, he is as a meer Stranger, and not as Heir ; and tho' he were able to avoid it by Writ, or the like, yet it being once good, the particular Estate of Simon the Father of Charles was determined, before the Contingent Remainder to the first Son could take place, and consequently it can never after revive. Then the Question is, Whether this Surrender by a *Non compos*, being an act done by himself, and not by Attorney, be void or only voidable : There's no express Case that a Surrender, by one who is *Non compos* to him in Remainder, is void. Perhaps 'twill be said, as it hath been, That the Acts of a Madman are meer Nullities by all Laws in the World. But to this 'tis an Answer, That the Laws of England have made good and honest Provisions for them, so as to avoid their Acts for the Benefit of the Party, of the King and of the Heir. But it was repeated, that this was a Contingent Remainder, and if it could not vest when the particular Estate did determine, whether by Death or Surrender, it never could vest at all ; for a future Right to defeat the Surrender, as Heir, cannot support such a Contingency ; a present right of Entry would ; but if no such present right, the Remainder is gone for ever ; and here was no such in Charles. If Tenant for Life make a Feoffment with condition of Re-entry, the Contingent Remainder shall never arise again, tho' the Condition be broken, and a Re-entry were made. So is the Case of *Purefoy versus Rogers*, 2 Saund. 380. *Wigg versus Villers*, 2 Rolls Abridg. 796. and then Charles cannot avoid this Deed ; for the avoiding of a Deed, is to take somewhat out of the way, in order to the revesting of somewhat ; but here was nothing to work upon ; for if the Surrender were good for a Moment, the particular Estate for Life was once gone, and consequently for ever ; and this must hold, unless the Act were totally void.

Then 'twas argued, That during the Life of the Party, 'twas only voidable for the King by Office ; no Man can Stultifie himself ; and so is the great Resolution in *Beverly's Case*, 4 Rep. and 1 Inst. 247. and *Whittingham's Case*, 8 Rep. and if it be not void as to himself, it cannot be void as to others. And tho' *Fitzh.* in his *N. B.* says that he himself may have a *dum non fuit compos*, that is not agreeable to the received Law ; for *Beverly's Case* was never shaken

shaken till now; and *Fitzh.* supposes it only voidable, by saying that Writ doth lye. There is also a Reason for this Rule of Law, that a Man shall not disable himself by pretence of Distraction, because if the Pretence were true, he had no memory, and consequently could not know or remember that he did such an Act, and therefore 'tis, as it were, impossible for him to be able to say that he was so distracted when he did it: 'tis for him to say what 'tis not possible for him to know. But they would compare this to the Case of an Infant, yet even there all his Acts are not void; his Bond is only avoidable; he cannot plead that 'tis not his Deed: 'Tis true, that Acts apparently to his prejudice cannot be good, as 1 *Cro.* 502. Suppose a *Non compos* Signs, Seals, and Delivers such a Deed, and after recovers his Senses, and agrees to it, would not this be a good Surrender from the first, *Perkins* sect. 23. 1 *Inst.* 2. and if it can be made good by a subsequent Agreement, 'twas not totally void, and if not totally void, 'tis with the Plaintiff in Error: The Law besides is very tender in case of Freeholds, to make Conveyances void by bare Averments; and this would be of dangerous Consequence, if when there was no Inquisition or Commission of Lunacy during Life, that thirty or forty years after a Conveyance, it should be in the power of a Stranger to say, that the Vendor was mad; 'twill make Purchasors unsafe: Acts solemnly done, ought to have a solemn Avoidance. The 1 *Hen.* 5. cap. 5. Fine to be void; 'tis void as a Bar, but yet it makes a Discontinuance, and must be solemnly avoided. *Lincoln Colledge Case*, 3 *Rep.* *Stroud and Marshal*; 3 *Cro.* 398. *Dett sur Oblig'* The Defendant pleads that at the time, he was of *non sane* memory, and on demurrer adjudged no Plea; and the Opinion of *Fitzh.* held not to be Law. And 3 *Cro.* 622. 50 *Affis.* 2. *Fitzh.* Issue 53. a Release by a *Non compos*, which is much the same with a Surrender, only one works upwards, and the other downwards; and after Recovery the Party agrees to it, the same is binding, 39 *Hen.* 6. 42. and 49 *Edm.* 3. 13. Then was mentioned the Provision of the Law in these Cases, besides the Care of the Court of Chancery, which protects the weak and unwary by Rules of Equity. There's a Writ *de Ideota Inquirend'*, and the express direction of the Writ is to enquire *quas terras alienavit*, which shews that 'tis not void. The Statute of *Prerogativa Regis*, is express Authority for it; the Reason given is, that such Persons Lands should not be aliened to their hurt or the King's. It must be agreed, that before Office found the King cannot avoid the Alienation, even of an Idiot: and then after Office, the Practise is to Issue a *Scire facias* to him in possession, or to the Alienee; and so is *Fitzh.* tit. *Scire facias* pl. 2. 106. All these Methods prescribed by the Law would be useless, if the Acts themselves were void: Then 'tis as certain, that the Office must be found during the Parties Life, and during the insanity, and not afterwards. If there had been an Office, 'twould only avoid it with a prospect, as it would be in case of an Heir after death: Even after an Office, the King cannot have the Profits from the time of the Alienation, which shews it not void

it not void from the beginning. If a Suit be against an Ideot after Inquisition, the Ideot cannot plead it, but the King shall send a *Superfedeas* to the Judges, suggesting the Inquisition; so that even then the Party himself cannot avoid it.

As to the other way of avoiding it by the Heir, it must be by Writ of Entry; and till Entry or Writ the Act remains good. But here's no Contest with the Party himself, or with his Heirs, but with a Remainder Man. This Act of Surrender was no torious Act, it wrought no discontinuance: there was no Trust in him to preserve the Contingent Remainder. A Feoffment with livery is allowed not to be void, and yet that may do a wrong by discontinuance, &c. As to the pretence that a Warrant of Attorney to make livery is void, that doth not reach this Case; for here's an Act done by himself, which would have passed the Estate as by and from himself, if he had been of sound Mind.

Then 'twas desired that the other side would shew any such Case as this, whereas multitudes of Gifts, Grants, Releases, Bonds, and other Specialties, sealed and delivered by the Party himself, are allowed to be good; and the same reason holds for a Surrender made in Person; and there's no difference between a livery made in Person and a Surrender; the Act being Personal, and not by another under his Authority, makes the livery good; and so it ought to be here: 18 Ed. 4. 2. *Perkins* sect. 139. And 'tis observable in 39 Hen. 6. 42. per *Priscott*, upon the Inquisition, 'tis re-seized and re-vested into the Interest of the Ideot, and consequently of the King; and if re-vested, 'twas once out of him. Now here's no prejudice to the Man himself by this Opinion; he is taken care of, and his Acts avoided by the King on his behalf; and his Heirs may avoid them: But that Strangers should take notice of them as void, was denied; and therefore prayed that the Judgment should be reversed.

On the other side it was argued with the Judgment, That this never was a Surrender; that 'twas against sense and reason, to allow the Acts of a Madman, a Person distracted, to be valid to any purpose; that in case of livery it had been allowed to be only voidable, by reason of the solemnity and notoriety of the thing; but in case of a Deed, or a Thing passing only by Deed, 'twas otherwise; and *Bracton*, *Britton*, *Fleta*, and the Register were cited, where 'tis declared who can take, and who can alien, and that a Madman cannot alien; and *Fitzb.* is of Opinion, that the Writ of *dum non fuit compos* may be brought by himself; that there was a notion scattered in the Books, that such Acts are only voidable; but the reason of the Law is otherwise. 39 Hen. 6. 42. hath the distinction; that Feoffment with livery is good, but if livery be by Warrant of Attorney, 'tis void. If it be a Feoffment with Warranty by Deed, and possession delivered with his own hands, yet the warranty is void, because the Deed is void. *Perk.* 3. The Deed of a Madman is void: if he grants a Rent, 'tis void. If an Infant makes a Warrant of Attorney, 'tis void; so is *Whittingham's* Case: A Deed and a Will are not to be distinguished; and by the same reason that the one is void, the other is so. *Finch.* 102. is general; All Deeds

of a Man of *non sane memorie* are null: 12 Rep. *Shutter's Case*. 'Tis an offence to procure a Deed from him. The Civil Law makes all his Acts, which he doth without consent of his Curator, to be void: A Madman is taken *pro absente*: 'Tis a Rule unaccountable, That a Man shall not stultify himself; that he shall not be able to excuse himself by the Visitation of Heaven, when he may plead Duress from Men, to avoid his own Act. 'Tis absurd to say, That a Deed procured from a Man in a Fever, or in *Bethlehem*, shall be valid to any purpose. *Fitzherbert*, who was a good Lawyer, ridicules the pretence, and maintains, That he himself may avoid such Act. Then were cited 2 Inst. 14. *Lloyd and Gregory*, 1 Cro. 501, 502. *Perkins tit. Grant*. 13. Then it was said, That in this Case there needs not much Argument, the Reason of the Thing exposes the pretended Law. And the Judges have declared that this Surrender is void; the word *amens* or *demens*, imply that the Man hath no Mind, and consequently could make no Conveyance. Wherefore 'twas prayed that the Judgment should be affirmed; and without much debate it was accordingly affirmed.

Henry Earl of Lincoln by Susanna Countess of Lincoln his Mother,
and Prochein Amye Appellant,

Versus

Samuel Roll Esq. Vere Booth, Hugh Fortescue Esq. and Bridges
his Wife & all Respondents.

A Appeal from a Decree of Dismission in Chancery: The Case was thus; *Edward* late Earl of *Lincoln*, who was Son and Heir of *Edward*, Lord *Clinton*, the only Son of *Theophilus* Earl of *Lincoln* deceased, being seized in Fee of the Mannors of, &c. after his Mothers decease (who is yet living) and of other Lands of about 3000 l. per Annum, part of the ancient Estate of the Family. And designing that in default of Issue-Male by himself, his Estate should go with the Honour, made his Will 20 Sept. 34 Car. 2. and thereby devised the Premises to Sir *Francis Clinton* for Life, Remainder to his first and other Sons in Tail-Male, with many Remainders over to such Persons in Tail-Male to whom the Honour might descend; and directed that his Household Goods at . . . should remain there as Heir Loomes, to be enjoyed by the next Heir-Male, who should be Heir of *Lincoln*, and made the said Sir *Francis*, the Appellants Father, and after his Death, Earl of *Lincoln*, Executor. On the sixth of Novemb. 36 Car. 2. Earl *Edward* made another Will in writing, in like manner, with the alteration of some Personal Legacies; and afterwards in April 1686. and in Dec. 1690. did republish his Will. Then Earl *Edward* sold

sold part to *Richard Wynne Esq;* for 24491 l. 3 s. 6 d. and mortgaged the Premises in question to him for 12200 l. Then *Earl Edward* by Deeds of Lease and Release, dated the 27th and 28th of April 1691. conveys his whole Estate to the Respondents *Davenport* and *Townsend*, and their Heirs, to the use of him and his Heirs, till his then intended Marriage should take effect: And after such Marriage had, then as to part, in trust for his intended Wife, and her Heirs and Assigns for ever: And as to the rest, in trust to permit the said Earl to receive the Profits during his Life; and after his decease, to sell the same for the best price, and out of the Money raised by Sale, to defray the Funeral Expences, and pay his Debts, and deliver the surplus, as he should (by his last Will and Testament in writing, attested by three Witnesses, or by another Deed in writing so attested) appoint; and for want thereof to the Executors and Administrators of the Earl; with a Proviso, That the said Earl, by his last Will and Testament, or any other Deed in writing (to be thereafter by him made and executed, and attested as aforesaid) might alter, change, determine, or make void all or any the Trusts aforesaid; and for want of such after to be made, will or deed, then in trust for the said *Earl Edward*, his Heirs and Assigns for ever; *Earl Edward* died without Issue of his Body, and without Marriage.

The Appellant exhibited a Bill to have the said Deeds of Lease and Release set aside, and to have the Will executed. The Respondents, as Heirs, insist upon the Deeds as a Revocation; and their Heirship was thus: *Theophilus* Earl had Issue *Edward*, *Katharine*, *Arabella*, and *Margaret*; *Edward* died in the Life time of *Theophilus*, leaving Issue *Edward* late Earl of *Lincoln*; *Katharine* by *Sir George Booth* had Issue the Respondent *Veer Booth*; *Arabella* by *Robert Roll* had Issue *Samuel Roll*; and *Margaret* married *Hugh Buscoven*, and had Issue the Respondent *Bridget Fortescue*. And the Court, assisted with the two Chief Justices, and Mr. Justice *Powel* saw no Cause to relieve the Appellant.

And now it was argued with the Appeal, That the Dismission was Erroneous, there being Cause for Relief, for that the Marriage never did take effect, nor any serious Overture or Treaty was made by the said Earl on that behalf; so as the said Earl did continue, and at the time of his death was seized of the same Estate in the Premises he had at the time of making and publishing the Will; that if at Law the Deeds of Lease and Release were in strictness a revocation of the Will, yet in Equity they ought not to be construed a Revocation of the said Will, so often and so solemnly and deliberately made and published, and upon so good a Consideration as the support of the Honour; that the said Will was the Result of the Earls continued Intentions throughout his Life, and the Deeds were only the effect of some sudden Fancy or Passion; and even by those Deeds no benefit was designed to the Respondents; for the disposition of the Surplus of what

should be raised by the Sale, was to be to his Executor Sir F. C. the Appellants Father; and that did evidence a continued Kindness to him, who never had offended him, and no regard to the Respondents, who (tho' they were his Heirs general) were related only at a distance, and scarcely known by him; and very well provided for, by great Portions raised out of the Estate for their Mothers.

Then 'twas argued that this Estate was meerly an equitable one, and consequently Equity only ought to govern the disposition of it: here's no express Revocation pretended; that a Mortgage in Fee is no Revocation, for in Equity it doth not make the Estate anothers: Here is a Noble Peer, who is to sit in the Seat or Place of his Ancestors, and therefore no Presumption, Intendment or forced Implication ought to be against him or his Interest; that this was designed to take effect, in case the Marriage was had, and not otherwise; that here was no intention to revoke, but upon the Contingency of his Marriage: And there was cited *Zouch and Barker's Case 1625.* in the Lord *Coventry's* time, *Chancery Rep.* and the Lord *Boucher's Case* in *Edward the Sixth's* time; the Case was said to be in *Dyer*, left as a Query, and in *1 Rolls Abridg.* And for these, and many other Reasons and Authorities urged, 'twas prayed that the Dismission should be Reversed, and the Appellant Relieved.

On the other side 'twas insisted, That tho' this was not an express Revocation by the use of words declaring it to be such, yet 'twas a true, legal, and effectual Revocation; that these Deeds of Lease and Release did alter the Estate; that here 'twas for payment of Debts, as well as in consideration of the intended Marriage; that here was a manifest change of his Intention; that both Will and Deed were voluntary and inconsistent, and therefore the latter must stand; that here were no Children or Creditors claiming under the Will; that tho' the Subject Matter were an equitable Interest, yet Equity ought to follow the Rules of Law; that the Law made this a good Revocation, and Equity ought to judge it the same way, unless Fraud were proved to be used in the procuring of the Execution of these Deeds; that the reason why a Mortgage even in Fee, is not a Revocation, is because a Mortgage doth carry upon the face of it a Defeasance; 'tis not reckoned an Inheritance to the Heir of the Mortgage, but shall be Personal Estate, and Assets to pay the Mortgagee's Debts. This Deed was revocable by an after Will, which shews the Party to have no regard for any former Will, nor is there any reference to the Will then in being: If a Marriage had happened, 'twould be agreed to have been a Revocation; and if so, when was the Will revoked? by what Act? by the Deed, or by the Marriage? That it was said that it certainly would have been revoked by the Deed, and consequently ought to be construed a Revocation, tho' no Marriage did ensue: Revocations are the same in Equity as at Law; and so was it held in the Case of the Earls of *Bathe* and *Mountague*.
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The Statute of Frauds never was thought to extend to such Revocations as these: Tho' Earl Edward's Intentions were once to support the Honour with the Estate, yet it was always in his power to alter it: The Lease and Release passed the Equity of Redemption, and consequently 'tis the same now, between the Appellant and Respondents, as if there had been no Mortgage in the Case.

'Twas further urged, That a Will is but an imperfect Conveyance, inchoate only, and ambulatory (as the Books term it) till the death of the Party; and another Will may revoke it, and with greater reason may a Deed, which alters the Estate, and shews a change of the Intention of the Person who was Owner of it: There's no need of a Consideration to warrant the Revocation of a Will; there needs no reason to be given for it; 'tis only the Mind of the Party which both makes and revokes the Will. A Will is only the signification of a Man's purpose, how his Estate shall go after his death; and tho' it be solemnly made in writing, signed, published, and attested, yet if he do any intermediate Act, whereby it must be necessarily inferred, that such Purpose and Intention of his did not continue, the Consequence must be, that what was done before, as to such Will, is totally defeated; and unless it be set up anew by a Republication, 'tis as no Will. The Case of *Mountague and Jeffries*, 1 *Rolls Abridg.* 615. and *Moore* 429. proves this: If a Conveyance at Law shews an Intent different from the Will as to Lands, 'twill be a Revocation, tho' such Conveyance be not perfect to all purposes. *Hodgkinson versus Wood*, *Cro. Car.* 23. 'Tis a Revocation, tho' the Owner should be in again, as of his old Reversion. The Case of *Lefrange and Temple* 14 *Car.* 2. reported in *Sid.* 90. 1 *Keble* 357. is stronger; but this is stronger yet, because 'tis not to the old use, but limited in a different manner; 'tis a qualified Fee, and to be determined upon the qualifications taking effect; and so cannot be the old Estate; and if it were, yet 'tis a Revocation, and there's no Circumstance in the Case, that can direct a Court of Equity to differ from the Law; and therefore it was prayed, that the Decree of Dismission might be affirmed; and it was affirmed.

John

John Fox Gen^r Plaintiff,

Versus

Simon Harcourt Arm^r Defendant.

WRit of Error on a Judgment in B. R. The Case was upon a Special Verdict, in an Action of the Case, upon an *Indebitus Assumpsit* for Moneys received to the Plaintiff's use, brought there by *Harcourt versus Fox*, which Verdict finds, the 37 Hen. 8. cap. 1. intituled, a Bill for *Custos Rotulorum* and Clerkship of the Peace. Then they find that 1 Will. & Mar. intituled, An Act for enabling Lords Commissioners for the Great Seal to execute the Office of Lord Chancellor or Lord Keeper, and several Clauses therein concerning this Matter. Then they find that *John Earl of Clare* was by Letters Patents, dated the 9th day of July, Anno 1 Will. & Mar. according to the 37 Hen. 8. made *Custos Rotulorum* for the County of *Middlesex*, and set forth the Letters Patents in *hac verba*. Then they find that the Office of Clerk of the Peace for this County being void, the Earl of Clare by writing under his Hand and Seal, dated 19 July Anno primo, did nominate, appoint, and constitute the Plaintiff, Mr. *Harcourt*, to be Clerk of the Peace for *Middlesex*, for so long time only, as he should well demean himself therein, and the Instrument was found in *hac verba*. Then they find him to be a Person resident in the County, capable and sufficient to have and execute the Office; that he took upon him the execution of the said Office; and before he did so, he at the Quarter Sessions for the said County, in open Sessions, took the Oath required by the late Act of this King, and the Oath of Clerk of the Peace, and did do and perform all things necessary to make him a compleat Officer; and that during all the time he did execute the said Office he demeaned himself well.

Then 'tis found, That on the fifth of February, Anno tertio, the said Earl of Clare was in due manner removed from being *Custos*, and *William Earl of Bedford*, by Letters Patents dated the sixth of February, was made *Custos* according to the 37 Hen. 8. and those Letters Patents are also found in *hac verba*. Then they find an Appointment in Writing, dated the fifteenth of February by the said Earl, of the said Fox to be Clerk of the Peace for the said County, to hold the said Office for and during the time the Earl should enjoy and exercise the said Office of *Custos*, so as he well demean himself therein. They likewise find Fox to be a Person capable, &c. and that he took the Oath, and did the other things requisite to qualify himself for the said Office; that he did thereupon enter on the Execution of the said Office; and during the time that he executed it, he well demeaned himself therein, and did take the Fees belonging to the said Office, which they found to

to be to the value of five shillings, *Sed utrum, &c. Et si, &c. Et si, &c.* Upon this Judgment was given for the Plaintiff below.

And it was now argued for the Plaintiff in the Writ of Error, That this Judgment ought to be Reversed. And first it was said, that whatsoever the Common Law was, as to ancient Offices, could be no Rule in this Matter: Many and most of those were for Life; but my Lord Coke says, That the Office of Chancellor of England could not be granted to any one for Life, because it was never so granted; the like of Treasurer: So that Custom, and nothing else, can govern in those Offices. But here can be no pretence of its being a Common Law Office; for the Common Law knew no such thing as Justices of the Peace, to whom, they say, he is a Clerk: That the first Statute which makes Justices, hath no mention of Clerk; but 'twas meerly an Incident; some Person of necessity was to officiate in that kind: And where he is called the Justices Clerk, it can only be, that he was one appointed by them to make and write their Records for them; and 'tis probable, that in ancient time, he that was their Clerk was *Custos Rotulorum*, and intrusted with the keeping of the Records; then it coming to be an honorary thing to be *Custos*, he that was the most eminent for Quality amongst them, was appointed to that Trust, and then he appointed his Clerk under him: For there's no ancient Statute or Law, that empowered the Chancellor to make a *Custor*; but he making out the Commission of the Peace, might very well name one of them to be Keeper of the Records, and to have the first place amongst them. And such Person might very well appoint his Deputy or Servant, who in time came to be Clerk of the Peace. We have no certain, but this is the most probable Account of the thing.

Then the Statute of 37 Hen. 8. recites, That the Chancellor had much perverted the Institution, by assuming to make *Custors* for Life, and so the Clerks of the Peace were for Life likewise. The end of that Act was not only to remove ignorant Persons; for the Common Law it self would turn any such out of Office, if he be not able to perform the Duty of it; but the Grants for Life, were the great Grievance; and therefore to remedy that Mischief the *Custors* must be appointed by Bill signed with the King's own hand, and at his pleasure removeable, and the Clerk of the Peace to be appointed by the *Custor*, and to continue only during the time of the others continuing to be *Custors*. This (tho' not in the Negative) doth amount to it, viz. that he shall continue no longer; especially when the Act recites the Mischief to be a Continuance during Life: It implies that the Clerkship of the Peace should be never granted, for a longer Interest, than the *Custors* had in his Office. The 3 and 4 Edm. 6. doth indeed repeal part of the 37 Hen. 8. not by express words, but by a very strong Implication, by giving the Chancellor a power to nominate the *Custors*: But the Office of Clerk of the Peace is not toucht by that
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of *Edw. 6.* and continues as settled by *37 H. 8.* which is during the continuance of the *Custos*.

Then 'tis the new Statute, which gives the occasion of the present Dispute; and there's nothing in this Act, which can make such an Alteration in the Law, as was below contended for. The words, *So long only as he shall well demean himself*, are not enlarging of his Estate, but Restrictive: and whensoever 'tis considered how to make a Grant for Life to be good, you must consider the power and capacity of the Grantor, and how the thing is capable of being so granted; as in Case of Tenant in Tail or Fee, and each make a Lease for Life; in the latter Case, 'tis for the Life of the Lessee; and in the former, for the Life of the Tenant in Tail, because of the different Capacities of the Grantors; and so the thing it self is considerable; here's an express Statute, that saith it shall be only during the continuance of the *Custos*; now that Provision is to be pursued: 'Tis said, that a Grant *quam diu se bene gesserit*, is for Life; but the words themselves do not import any such thing; 'tis indeed a restrictive Condition which the Law imposes upon all Offices; for Misbehaviour in any Office, if in Fee, is a Forfeiture; but the chiefest Consideration is, if it be an Office that is capable of being granted for life; if it be so, these words may amount to a Grant for Life, as expounded by usage and the nature or capacity of the Office it self: but otherwise, if the Office be not grantable for Life, such words will not give an Estate for Life: These words seem only to be an Expression of what the Law always implieth, tho' not particularly expressed. If it operate any thing, it seems only to have reference to the power of the Grantor, as a Restriction on him, and not as an Enlargement of the Estate of the Grantee, especially where by a Law in being there's an incapacity upon the very Office not to be granted for life.

Then it was urged that the Statute of *37 H. 8.* was not repealed by the *3 and 4 Edw. 6.* doth not alter this Matter at all; and where it did make any Alteration, the same is expressly repealed by this last Act in question. It is a settled Rule, that if there be two Statutes and both consistent and not contradictory, the latter can never be said to repeal the former; and so is *Dr. Foster's Case* 1 *Rep.* 93, 6. so is in Wills, *Hodgkinson* and *Wood, Cro. Cir. 129*. This last Act of *Walter Mar.* is consistent with the *37 Hen. 8.* as the one says, He shall continue during the time that the *Custos* doth remain such, so as he demean himself well: the other sayeth, He shall enjoy his place, so long only as he demean himself well in it. Now take the Office to be by the *37 Hen. 8.* only grantable to hold during the continuance of the *Custos*, then suppose in the same Act, it should be said to hold so long only as he demean himself well; where is the inconsistency or contradiction? And if in both, then this last Act doth not Repeal the former as to this Matter. And Mr. Fox's Grant is pursuant to the Statute of *Hen. 8.* and Mr. Harcourt's hath no relation to it.

Then 'twas argued, That 'twas unreasonable that a *Custos* should have an Officer under him of anothers choice, when himself is responsible for the Records which such Officer is concerned with. The primary Intent of this last Act was only to settle the Doubts about the Keepers of the Great Seal, not to alter the Estate of the Office of Clerk of the Peace. The Offices of the Judges in *Westminster-hall* determine with the King's Life who grants them, tho' they are granted to hold during good behaviour. In this Act, the reason of using these words, was for Caution, to advertise them that Misbehaviour should forfeit their Places. If an Alteration of the Law had been intended, they would have said, for Life, so as he demean himself well, especially when (as was said before) he was removable for Misbehaviour by the former Laws in being. Wherefore upon the whole Matter, it was prayed that the Judgment might be reversed.

On the other side it was argued with the Judgment, That 'tis clear and apparent that this Act of *W. & M.* was made not only to satisfie Doubts, and prevent Questions about the Office for the Custody of the Great Seal, but to settle the manner of naming the *Custos* and Clerk of the Peace; and that 'tis in part introductive of a new Law; and in part a reviver of the old: But the general end was, that that Office of Clerk should be filled and executed by a learned, able, honest Person, because it concerns the Administration of Justice. He is the King's Attorney in many respects; he not only writes the sense of the Justices in their Orders, but draws Indictments, and upon Traverses, he joyns Issue, as one *qui pro Domino Rege in ea parte sequitur*, and prays Judgment for the King in many Cases; joyns in Demurrer, when occasion requires, and is in the Sessions the same as the Clerk of the Crown is in the *King's Bench*. Now to accomplish this end of having a Person well qualified, and to encourage and oblige him to his good Behaviour, it requires a Residence in the County; it enjoyns that the Person named be able; it subjects him to the Jurisdiction of the Justices, who have a daily observance of his demeanour; it gives them a power to remove him upon a just Complaint, which they could not before; it frees him from the usual Temptation to Fraud and Corruption, by introducing him *gratis & sine pretio*; and to provoke his Care and Diligence; it gives him a more durable Estate in his Office, then he had before, when he bought it, *viz.* Freehold, an Estate for his Life: That it should be so, is convenient; because then he will be encouraged to endeavour the increase of his Knowledge in that Employment, which he may enjoy during Life; whereas precarious dependent Interests in Places tempt Men to the contrary.

That this is an Estate for Life, appears from the words of the Act; they do direct how long he shall enjoy his Office; so long only as he shall behave himself well: If the word *only* had been omitted, there could be no colour for a Doubt; By *1 Inst. 42.* 'Tis an Estate for Life, determinable upon Misbehaviour; for during good

Behaviour is during Life; 'tis so long as he doth behave himself well; i.e. If he behaves himself well in it, so long as he lives, he is to have it so long as he lives; during Life, and during good Demeanour, are therefore synonymous Phrases, the same thing when used with relation to Offices; the Condition annexed if observed, continues it during Life, the contrary determines it. This is the Rule and Law in case of Offices in general, and must hold in this, for this is an Office, 2 Hen. 7. 1. He is called *Acti Domini Regis*. 'Tis capable of being enjoyed for Life, and consequently of being granted so, especially when an Act of Parliament declares it shall be so. There's nothing in the nature of the Employment that hinders it; and there can be no doubt, but that a Statute may empower a *Custos* in possession, who hath only an Estate at will, to name a Clerk to hold during Life or good Behaviour; The Justices are at pleasure; Suppose then the Act had said, That they should name him in this manner, he must have continued, tho' they had died, or had been removed; the Case is the same here; he is as much intrusted with the Acts of the Justices, as with the Records belonging to the keeping of the *Custos*. Then there's nothing in the Act that savours of an Intention to make him dependent on the *Custos's* Office. The *Custos* is to name him, but the Justices have the controul over him; he is an Officer to the Sessions, and the Justices only can remove him. The Limitation of the Interest of the *Custos* in his Office, and that of the Clerk, are different; and that shews that the duration of the one was not to depend on the other. Besides, the *Custos* is to name, not when he shall be made *Custos* (as it would have been worded, if the intention advanced on the other side had been true) but whensoever it shall be void. It doth not say, Every new *Custos* shall, or that every *Custos* shall name, but generally when 'tis void, he shall, &c.

Then as to the Objection, That this new Act is consistent with the 37 Hen. 8. and therefore that is still in force? 'Twas answered, That by the former Act, he was intirely placed under the *Custos*, who had power to displace him upon Miscarriage; the Sessions then could not do it, tho' a Court; and a Court of Record; they might suspend him, but could not deprive him of his Office, even for ill Demeanour: This was that Act. Now the present Law abridges the power of the *Custos*; he must name a Resident, before he might appoint any able Person; the Person was then removable by the *Custos*, now only by the Justices; Care is taken, that nothing is to be given for the Office; and now he may make a Deputy without the approbation of the *Custos*. Here's plainly a different Jurisdiction over him, and a different Estate vested in him; this express Limitation of the Interest to him is an Exclusion of the former Estate, as dependant upon that of the *Custos*. And besides, this is a Substantive distinct enacting Clause of it self, and no ways relating to the Statute of Hen. 8. Why was this Limitation penn'd differently from that, unless to give another sort of Interest. As to the Cases of new Laws which repeal former, 'twas said, That the Rule was certain, that what-
soever

soever Statute is introductive of a new Law, tho' penned in the affirmative, is a Repeal of the former, as implying a negative; i. e. the latter ought to be observed, if it concerns the same Matter. The Statute of *Edw. 6.* controuled the Statute of *Hen. 8.* One directed the Keeper to name, the other the King, and both are in the affirmative; yet the latter must be observed. And if this be a new Estate (as it hath been adjudged below) then the Party ought to enjoy it. And for this was cited 1 *Std. 55. Plowd.* 113. and other Books.

Then 'twas said, That the Clerk of the Peace, named by the Justices, in default of the *Custos*, would have an Estate for Life; and by the same reason it ought to be so here: Tho' the *Custos* be to be named, according to the Statute of *Hen. 8.* yet he is not to execute his Power of *Custos* according to that Act, but is tied to a Resident; hath not the Approbation of a Deputy, and cannot remove. By the Statute of *Hen. 8.* the Clerk had but an Estate at the will of the King, the *Custos* having no other: This is so long as he doth well in his Office; these are different; and when the *Custos* hath named him, he is in by the Statute. If what they on the other side contend for, had been intended, there was no need of these words of Limitation at all; and the words, *in like manner as by the former act*, had fulfilled the intention, if such had been.

As to the word *only*, that would make no Alteration in the Case of any other Office. Suppose an Office granted to a Man *quamdiu tantum*, or *solummodo, se bene gesserit*, would that give less than an Estate for Life: The word *only* was added, not to abridge the Estate of the Clerk, but rather to restrain the Power of the *Custos*, that he should have Authority only to limit it during good Behaviour, and not for a less Interest or Estate: The *Custos* is confined, that he shall not grant it for Years, or at Pleasure. Besides, *only* is but just so long, and no longer, or so long as; and 'tis the same thing with the word, as without it. *Dummodo sola vixerit*, is during all her Widowhood. Suppose a power to make Leases to hold only for and during the term of 21 Years, the same would be good for the whole Term. Then 'tis no Objection, That the Estate of the Clerk is greater than his is who names him, for that may be by Custom, as in the Offices in *Westminster-hall*, *Hobart* 153. and the Clerks of Assize, where usage fixes the Estate. And the like in Case of Power to make Leases upon Family Settlements to Uses, where Tenant for Life grants larger Interests than his own: 'Tis true, the Powers and Estates raised by them, issue out of the Inheritance, but the Tenant for Life only names them; as the *Custos* doth here, tho' the Statute gives the Interest.

As to the Inconvenience, That dependent Offices should continue against the will of their Superiours, that can be no Objection, since there are few great Officers in the Realm, but have many Substitutes and Inferiours under them, which were named by their Predecessors, and are not removable; almost every Bishop

in England is under these Circumstances, with respect to the Register of his own Court, who notes and records his Acts, &c. This is an Exception to all Grants for Lives; but Credit ought to be given to the Honour, Wisdom, and Judgment of former, as well as present Officers, in respect of such Nominations, till some Misbehaviour shews the Choice to have been ill; and when that appears, the Persons are removable; and then the Inconvenience is likewise removed. Here the Jury have found the Plaintiff in the Action below, to be able and sufficient, and well qualified for the Office, and to have done his Duty in the Office, while he had it. Wherefore it was prayed that the Judgment might be affirmed, and it was affirmed.

Henry Lord Bishop of London, and Peter Birch D.D. Plaintiffs.

versus

Attorney General pro Domino Rege & Regina.

WRit of Error to Reverse a Judgment given in B. R. in a *Quare Impedit*. The Case upon Record was thus: The Declaration sets forth the Act of Parliament, which Erects and Constitutes the Parish of St. James's within the Liberty of Westminster, out of the Parish of St. Martins, &c. prout, that by force and virtue of that Act, the said Parish was made; and the District therein named became a Parish, and Dr. Tennison Rector of the same; that he was afterwards Rite et Canonice consecratus Episcopus Lincoln', and that thereby the said Church became void, and thereupon it belonged to the King and Queen to present a fit Person, ratione Prerogative sue Regie Coronae sue Angli' annex', and that the Defendants hindered, &c.

The Defendants crave Oyer of the Writ, and it is general; *Vic' Gai' Midd' sulin' precepe Henric' Episcopo Lond' & Petro Birch sacre Theologie Professor' quod iuste et sine Dilatione permittant nos presentare idamam personam ad, &c. que vacat et ad nostram spectat donationem; Et unde pred' Episcopus et Petrus nos iniuste, &c. And such they pray Judgment of the Writ and Declaration, because that between the Writ and Declaration, there is a material variance, viz. quod ubi per Brevie pred', pred' Dom' Rex et Regina eduxerunt se ad Donationem pred', &c. pleno Jure, tamen per Narr' pred' iidem Dominus Rex et Domina Regina intulerunt se ad, &c. ratione Prerogative sue Regie Coronae sue Angli' annex' unde pro violatione pred' inter Breve et Narr' pred', they pray Judgment of the Writ and Declaration aforesaid, and that the said Writ may be quashed, &c. The Attorney General Demurs, and the Defendants Joyn; and there's Judgment to answer over.*

Then

Then the Bishop Demurs generally, and Mr. Attorney Joyns, and Dr. Birch pleads that he is Incumbent, and then sets forth the Statute of Hen. 8. concerning Dispensations; and that after Dr. Tennison was elected Bishop, the Archbishop granted to him a *Commendam Retinere*, with power to take and enjoy the Profits to his own use, by the space of seven Months.

That this *Commendam* was confirmed under the Great Seal, according to the Statute; and the said Dr. Tennison did enjoy the same accordingly, &c. Mr. Attorney Demurs, and Dr. Birch joyns in Demurrer, and Judgment was given for the King, &c.

And now it was argued in the first place, That the Plea in Abatement was good; and if so, all that followed was Erroneous. And to make that Plea good, it was said that there is a variance between the Writ and Declaration; that they are founded upon several Rights; that upon arguing the Merits of the Cause, it must be owned to be so, on the other side.

That no Argument can be urged to maintain the Declaration in general, but the *Jure Prerogative*, and consequently it must be different from the Title or Interest *pleno Jure*.

They have said below that tho' the King's Interest is bound by Statutes, yet his Prerogative is not. This Distinction of the Rights must be allowed, or else the main Judgment is not justifiable; and that there is such a Distinction, appears in Gandy and the Archbishop of Canterbury's Case in Hob. 302. by the Presentation there recited, which was drawn by the King's Counsel; 'tis *ad nostram Presentationem pertinet, sive ex pleno Jure, sive ratione Prerogative*.

By Bratton 415. If the Writ be founded on one Right, and the Declaration on another, the Writ must be abated, as in Case of Executors and Corporations. In some Cases it must be agreed, That the Writ may be General, and the Count Special; but none of those Cases will reach to this, where several Rights are pretended. 'Tis no Objection to say, That there is no Writ in the Register for this; for that's rather an Argument against their Prerogative: Besides, this Prerogative was never allowed till Dyer's time; and in the old Books 'tis denied, where the King was not Patron.

In the Register 30. is a Writ Special, *quod permittant nos presentare idoneam personam ad Ecclesiam de, &c. que vacat et ad nostram spectat Donationem ratione Archiepiscopatus Cate nuper vacante in manu existentis*. And another *Sine titulo ut de jure*, and that is General, *ad nostram spectat Donationem*. Another Writ is there *Ratione custodie terre et heredis* upon a Tenure *in capite*. And another, *Ratione foris salture unius, et ratione custodie terre et heredis alterius per servitium*. Another Writ *pro Domino Rege et alii contra* in the Register 32. is another such by reason of the Vacancy of the Archbishoprick.

'Tis not an Answer, That the Writ of Waste is General, and the Count Special, because that is not *en autre droit*.

Then it was said that it is true, That where another Writ cannot be had, a General Writ and Special Count are allowable; but here a Special Writ might have been sued. And there were cited the 1 *Inst.* 26, 53, 54, 235, 244, 3 *Cro.* 185, 829. And as to the Queen and the Archbishop of York's Case 3 *Cra.* 340. that doth not come up to this Case; for tho' the Writ were General, and the Count in Right of the Dutchy of Lancaster, yet both were as Patron *pleno jure*; and the Count did only shew, how the Plaintiff came to be Patron; but here they were several Rights, as distinct, as a Claim by a Man singly, and a Claim as Executor, or *in jure Uxoris*.

In Answer to this were cited the Presidents in *Mich.* 31 *Hen.* 6. *Rot.* 65, *Pasch.* 9 *Eliz.* *Rot.* 1408. or 1410. *Hill.* 13 *Car.* 1. *Rot.* 486. *Trin.* 31 *Car.* 2. *Dominus Rex versus Episcopus de Worcester*, Writ General and Count Special, *Rastal* 528, 530.

Then it was argued, upon the Merits of the Cause, as it was, appearing upon the Declaration and Plea and Demurrer: and therein three Queries were made, as had been by the King's Counsel below.

1. If the King hath any Prerogative to present upon an Avoidance by Promotion, where neither himself, nor the Bishop, was Patron, but another Subject.

2. If this *Commendam Retinere*, and to take the Profits to his own use, was not a Service of this Prerogative turn.

3. Supposing that there be such a Prerogative, and that the *Commendam* makes no Alteration in the Case, then if this Vacancy of this Church be subject to this Prerogative.

As to the first it was argued, That where an Incumbent is promoted to the Order and Degree of a Bishop, his Living or Benefice becomes void; and that where a Bishop is Patron, and the Advowson and Bishoprick are become void at a time, there the King shall present, because while the Temporalities are in his hands, he is lawful Patron for that time, and consequently had a Right to present, but not by virtue of any Special Prerogative; but only as a Temporary qualified Patron, like a *Dominus pro Tempore* of a Mannor, may do Acts of Necessity which regularly belong to the very true Lord himself; and this perhaps gave the Colour for this pretended Prerogative: and in truth it answers every thing, that can be suggested from any ancient Authority, whether President, Book Case, or Opinion. It is otherwise where a Subject is Patron, and the King hath no Possession of, or a Right to the Patronage at that time; In such case he cannot present, and there is no Prerogative given by our Law, for to warrant such a Right to that Presentation.

All Prerogatives are founded upon some reason of Benefit to the People, either in respect of the Government in general, or else of some particular Subjects; but this hath neither: And in 3 Cro. 527. 'tis agreed, that there is no Reason for such a Prerogative, but 'tis added, and the Addition is somewhat strange, that many Prerogatives have no reason in them, or for them: and that 'tis unmannerly to Enquire or Doubt, if they are reasonable; whereas it might be thought that unreasonableness in the Matter contend- ed for, had been an Argument against any thing but an Act of Par- liament.

In Dyer 228. Sir Henry Sidney's Case versus the Bishop of Glo- ceſter, by Dyer 'twas agreed, That the Queen had no such Prero- gative; and he adds, *quod sic alij Socii mei sentiebant*; so that 'twas not his single Opinion against it, but the whole Court of C. B.

Then 'twas said that the ancient Law knew nothing of his Pre- rogative; all the Records, Law Books, and even Histories have been searched for the Maintenance of it, and no footsteps can be found for it: No *Bracton* or *Fleta*, no *Dr.* and *Student*, or *Stamf.* that treats of the *Prerogative*, hath any thing of it: Now all Pre- rogatives are and must be time out of mind, or not at all: And then, if this be not so, it must be an Usurpation, and being not time out of mind, it cannot be a Prerogative, because not part of the Common Law.

In the great Case which they so much insist on, of *Woodley* in 2 Cro. 691. Justice *Hutton*, who was an ingenious Man, a good Lawyer, and a true English Judge, that argued against Ship-money, he ex- pressly denies, that there was any such Prerogative; that the King had no Title to present, but where himself is Patron; and that there was no such Presentment, till of late days; nor any Book of Law to warrant it; but that Case which is in *Bro. Abr. Present- ment at Esglise* 61.

Then 'twas urged, That a few years Practice can no more make a Prerogative, then it can Repeal an Act of Parliament. 'Tis true, that in the Report of that Case, *Crook* seems to admit, that *Winch* was of Opinion for the Prerogative, and only *Hutton* a- gainst it; for he makes *Winch* to say, That the King has an Ab- solute Title by his Prerogative, as well in the Case of Common Persons Patronage, as where himself is so: But as 'tis in *Win- ches Reports* 96. where the Case is reported again, there they are both of Opinion against it; and *Winch* ridiculed the Opinion of *Bro. Presentment* 61. as the saying of the Bishop of *Ex.* who was then Chancellor, and might have right to present to it by force of his Place, if the King had such a Prerogative: And indeed *Bro.* himself makes a Remark upon it, as a thing never heard of before by a *quod nota*.

The King hath presented to *Liturgies* of other Mens Patronages, but that was not by force of this Prerogative, but on other grounds; as 40 Ed. 3. 40. the King presented to a Prebendary, when the Prebend was made a Bishop: And the reason of that Case makes for the Plaintiff in Error, i.e. because the Temporalities of the Bishop,

Bishop, who was Patron of that Prebendary, was then in the King's Hands, and then the King was Patron so long, and he did present as such: So is the 41 *Edw. 3. 5.* the same as Patron having the Temporalities in his hand: So is 44 *Edw. 3. 24.* upon another reason; a Parson is made a Bishop, and the King presented not *Jure Prerogative*, but because that the Patron was the King's Tenant *in Capite*, and the Heir was in Ward to the King, and so he had *Jus Patronatus* in him: The King hath it, where he has the Temporalities; so is *Fitzb. Grand Abridgment Title Quare Impedit pl. 35.* the King claimed Title to present to the Provost of Wells in the Gift of the Bishop, void upon the Provost, being made Deaf, because the Temporalities of the Bishop were in the King's hands at that time

The 11 *Hen. 4. 37, 59, and 76.* tho' cited on the other side below, is a full Authority; 'tis a noted Case, the ancientest Case in our Law concerning *Commendams*: The Case in short is thus; The King brings a *Quare Impedit*, and makes his Title by the Creation of the Incumbent to be a Bishop. There was some Debate on the Declaration; but the Defendants plead, that the King granted the Temporalities to the new Bishop, before the Living became vacant. Then the King waives that Declaration, and betakes himself to another Title, and Declares on the Statute of Provisors, because the Pope had usurped a Power which that Statute denied him; and there's no Judgment in the Case upon the first point; but 'tis most clear, that the King's Counsel in that Case were of Opinion against this Prerogative, because they did not stand to that Title, but amended their Declaration, and took to another.

This Point was directly to have been judged in the Case, if they had thought fit to abide by it: So that 'tis plain that they took the Plea to be good, if the Temporalities were in the King's hands, then the King was to present; if not, that he had no such Prerogative. And this is a great Authority, that the King had no such Prerogative, because he waives that Title and goes to another.

4 *Edw. 2. Maynard 148.* Hugh de Courtney brings a *Quare Impedit* against Thomas de Hutwet for the Church of Bingham, and sets forth that Isabel de Force, Countess of Auverle, presented such a one, upon the Livings becoming void by Cession, viz. by the Incumbents being made a Bishop; but never a word of the King's Title in all the Case, or any such Prerogative as is now contended for.

And in Owen's Rep. 144. *Walmesly* cites a Precedent which he had seen in Edward the Second's time, adjudged that the King had no such Prerogative; and all that was said for it was eight or nine Precedents in Tradition or History of a Patron, being complemented out of his Right; but not one Law-Book for it.

Coke 4 Inst. 356, 357. who wrote and published much, he never mentions this Prerogative, but says that the Law is otherwise; for upon his Observation on a Record of 24 Edw. 3. Rot. 25. coram Rege, Cornub'.

Admittitur Episcopus Exon' pro fine 200 merc' pro contemptu in non admittendo presentatum Regis ad Ecclesiam de Southwel; pro quo contempt' omnia temporalia Seisita fuerunt in manus Regis, & tunc temporis ante finem fact' vacavit Archidiaconat' Cornubiæ ratione quod Incumbens Electus fuit in Archiepiscopum Dublin' in Hibernia, (Temporalibus Episcopi Exon' ad tunc in manibus Regis existent) per quod Dominus Rex recuperavit versus Episcopum dict' Archidiaconat'.

Upon this Record he makes two Conclusions;

1. Tho' Ireland be a distinct Kingdom, yet 'tis governed by the same Law as England in these Matters.

2. That when the Arch-Deacon was by the King preferred to an Archbishoprick, he had the Presentation to the Arch-deaconry in respect of the Temporalities of the Bishop of Exeter, Patron of the Arch-deaconry, and not by any Prerogative.

Here 'tis observable, That my Lord Coke took it that the Patronage, by reason of the Temporalities, gave to the King this Right, and not the Prerogative.

Then his next Paragraph is stronger, If a Bishop in England be made a Cardinal, the Bishoprick becomes void, and the King shall name his Successor, because the Bishoprick is of his Patronage. All which implies, That if 'twere not of his Patronage, 'twould be otherwise, else why is that reason added.

Obj. But then say they, The Pope's Usurpation prevailed in all those times, and the Pope had it when Provisions were in use. But that can be no Argument to give the Crown a Prerogative, for the Pope was a Tyrant over the English Church, and by the same Reason the King may claim to be above all Laws, because some Judges said as Hank did in Hen. 4. *quod Papa potest omnia*; at that rate no Act of Parliament shall bind the King, because the Pope thought himself bound by no Law of ours.

Besides, There were several of our English Monarchs and English Parliaments, that boldly withstood these Usurpations; and there were divers Intervals of Liberty and Freedom from that Romish Yoke, and we never read of any Exercise of this Prerogative in those Intervals.

'Tis questioned in 41 Eliz. and in Owen's Rep. 'tis said that the Pope's practise was no Authority to warrant a Prerogative, for they used to do strange things, and the Clergy then made his Will a Law; and our English Lawyers have always complained of it.

Obj. There's no ancient Books that mention Title by Lapse. But 'twas answered, That in Caudries Case, 'tis fetch'd from the Reign of Edw. 3. and that is no very late Reign, and Lapse is so ancient, as it appears by the close, Roll 21 Hen. 3. in n. 12. that the Dean and Chapter pretended to it during a Vacancy of a See upon

an Advowson of the King's own ; but it appears there by a Writ to that purpose, that no Lapse *per tempus semestre* accrued on the King, which shews that 'twas old Law for the Subjects, *Prynne 2.481.*

By a Writ 8 Hen. 3. num. 4. *Dorso, Prynne 2 Vol. 389.* it appears the Archbishop of York was to present *si ultra tempus sex mensium vacare contigerint*, and 1 *Inst. 2 Inst.* and all the Books are full of it, and *Doctor and Student*, which is no new Book, treats of it, *cap. 31.* Besides, that and this are different Cases ; there is a necessity of such a Law for the Service of the Church ; the King is by the Constitution intrusted with the Supreme Care of his People, both for Religion and Property ; and if a Patron will not do it in reasonable time, 'tis reasonable he should lose it, and the King present.

But to make that a similar Case, they should shew that these Prerogatives were of equal duration ; and that there's as much reason for the one as for the other ; but because the King hath preferred the Patron's Friend, therefore the King shall have it, that cannot hold upon a *toties quoties* when the Friend is dead, and three or four more of the King's presenting, for by this means the Patron may never present to his Church.

2. The next Query was, Whether this *Commendam* for above the six Months, with power to take the Profits to his own use, shall be a fulfilling of this turn, or otherwise prevent the Operation of the Prerogative on it ; by this he was a plenary Incumbent after Consecration, and he had the Profits to his own use : He was not merely the Ordinary's Deputy to supply the Cure during six Months, but hath it in his own right, and this with the King's concurrence.

The Prerogative could only work upon an Avoidance by Promotion, and that is upon Consecration ; this becomes void at the expiration of the term limited.

It is to be considered, That this is none of the old Prerogatives of the Crown, which in a Competition are to be preferred before the Subject's Right, it is a Prerogative not to be favourably interpreted, but *stricto Jure*, for 'twas only taken up as a Papal Right, and so is plain from 2 *Rolls Abridg. 358, 359.* As such a Papal Right, it ought to be interpreted *stricto Jure*, even by the Pope's Law, being against the Patron's ordinary Right, and so 'tis *natura re obsequi* ; there might be cited *Stares* and others to this purpose : Perhaps the Pope's Right was not so much allowed here, as to make it clear with him in this Point ; for *Dr and Student, cap. 36. § 37.* says, that the Pope's Collation of Benefices *vacantium in Curia* was held to be within the Statute concerning Provisions, *vis. 12 Edw. 3.*

This Prerogative hath been construed *stricto Jure* here :

1. In the Case which the Lord Chief Justice *Engbham* Reports, where the Crown upon the promotion of an Incumbent to the Bishoprick of Oxford (and who by Dispensation retained his Living till death) would have presented to the Living when it fell void by the Incumbent the Bishop's Death ; it was resolved that the King's

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Prerogative was not to present to the next Avoidance after the Promotion, but to the next Avoidance by the promotion which in that Case was none, for that the Avoidance was by Death.

2. In the Case my Lord Chief Justice *Dyer* reports 228. the promoted Incumbent was dispensed with to retain for a term of years; within which term he resigned; and there, upon the Avoidance, the Prerogative was not admitted to take place, because the Avoidance was by the Resignation, and not by the Promotion.

Now if this Prerogative is to be interpreted *stricto jure*, it will have no place in this Case, where the Incumbent promoted is dispensed with to retain for a term of time which is elapsed: For,

The King's Prerogative will have a very Natural Construction, by admitting his Title to present to all such Avoidances, as commence immediately from and by the promotion.

This is the Avoidance which the Law intends, and which the Law would always cause (if not hindered to operate by Dispensation) and this Avoidance is that therefore, which the Prerogative must most principally respect, and only that, if it be to be strictly taken; insomuch that were it in the sole power of the Archbishop to grant this Dispensation, it seems the King's Title would clearly be set aside by it: much more therefore should it be so, when what the Law designs, is prevented by the Act of the King himself: For tho' the Lord *Vaughan* saith, That the King's Concurrence to the Dispensation is only for formality; yet 'tis plain that the King may force the Archbishop to grant it.

Now this Interpretation of the Prerogative seems to be already made in the Case cited upon a Resignation of the Incumbent dispensed with, for, (as it is there intimated) if the King's Title was not supposed to be gone by the defeating of the immediate Avoidance, which the Law intended, but the King would not permit. It would be very strange that it should be eluded by the Resignation of the Incumbent, to which the King was no Party; for if the King had a Prerogative to present to this new, this deferred, this adjourned Avoidance, it would be more reasonable to allow it to be hastened, then defeated by such a Resignation before the time.

This Prerogative ought to admit such a Restriction from the reason of the thing, and from the consideration of the Inconveniencies which may otherwise follow.

To the Subject. A Patron might be content to let the King exchange a single Life, and put in a Clerk in the place of one removed, much rather than that the Living should be held on by one in *Commendam*, that from thenceforth would be sure to leave it, and be absent for a better Residence in a Palace; yet they may, as they have reason, think it too hard, that the King should, as it were, let a Lease of it first, and afterwards put in his Clerk for Life; and tho' the King doth commend here but for a small time, yet he may for a longer. He may perhaps, as the Pope did

did often, dispence with the Bishop to hold *durante beneplacito*, and when the Incumbent is in danger of Death, then present another; so as the Patron may have his own Clerk not removed, as was first intended, but dispensed with, to wear out his Life in the Benefice, and yet after all have another put in.

The Crown may have Inconvenience by the straining of it further than this, for all strains weaken, it not break the thing it self.

This Opinion of theirs arises from the Principle my Lord Vaughan lays down, That a *Commendam* neither gives nor takes away Right, but only is a Dispensation to hold, and he continues Incumbent still, and it prevents an Avoidance; and if so, why should it not also prevent the operation of the Prerogative too.

As to the Case of *Woodley*, 2 Cro. 691. they say 'tis Law, to prove the other Point for them; If it be Law for them in that Point, 'tis Law against them in this.

That a Dispensation *ad retinend* prevents the Grantee of the next Avoidance: The Case was thus, A Man hath a Grant of the next Avoidance, the Incumbent is promoted, but with a *Commendam Retinere* for six years, and dies, the Grantee shall not present, because he is to have the next Avoidance only, and no other: 'Tis the words of the Book, that when the Incumbent is created a Bishop, and the King presents, or grants, that he shall hold it in *Commendam* (which is *quasi* a Presentation) and he is thereby full Incumbent, and may plead as an Incumbent; if the Grantee of the next Avoidance do not then present, he hath lost his Presentation; for he ought to have the next, and he cannot have any other.

Now if this be so that a *Commendam Retinere* hath so much of a Grant in it, and is so equivalent to a *Commendam ad recipiend*, that it will set aside and frustrate a Grant of the next Avoidance, and be it self taken for a presentation to the next Avoidance against the Grantee; by the same reason it must be taken so against the King, as a Presentation to an Avoidance, and consequently his turn is served by it.

Much might be said against those *Commendams*, as promotive of Pluralities, and tending to the ruine of the Church, and this out of our own Law-Books; but it is not material at present; 'tis however to be observed, that this is not a *Commendatory* for six Months, during the time that the Patron may forbear to present; such Person continued then, is only *commendatarius* under the Bishop to provide for the Church, as 'tis his Duty to take care of it during that time.

3. Admitting that the King hath such a Prerogative, and that this *Commendam*, tho' it gives the full perception of the Profits, is not a fulfilling of the King's turn, nor doth any way distinguish the Case, or exempt it from the Prerogative: yet this is a Case not within it; and this doth appear of Mr. Attorney's own shewing in his Declaration upon the King's behalf: He hath set it forth to

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be a Parish newly created by Act of Parliament, a thing not *in esse* before. It appears by the Declaration what that Act is; it must be taken as 'tis there set forth. To this Declaration the Bishop hath demurred. Now if by that Declaration it appears that the Bishop, and not the King, is rightfully intituled to present upon this Avoidance, the Judgment will and must be accordingly for the Defendants.

Mr. Attorney, by his Count, doth agree an Avoidance with this Act of Parliament, by the Promotion of Dr. Tennison; and Mr. Attorney doth likewise admit and agree, That the King is not Patron of this Benefice called, St. James's; he doth agree too, That the King hath no Right given to have any Turn or Presentation by this Act; for he saith, 'tis to be by the Bishop of London and the Lord Jermyn; he doth also admit by this Declaration, That Dr. Tennison was never presented to this Living; that he came not into it by Virtue of any Presentation from any particular Patron; nay, That he did not come into it by any sort of Presentation whatever; nay, he yet doth further agree, That this Parish Church was never presented to by any Person at all.

But he insists upon it, That now it is void, the King hath a Right to present to it, by force of his Prerogative upon this Avoidance; and the Act saith, That the Bishop shall present after the Death of Dr. Tennison, or the next Avoidance.

The Query is, whether the King's Prerogative can operate upon this Vacancy of this Benefice, thus filled, and thus avoided, against the expresse Words of an Act of Parliament. It will be necessary to repeat the Words of the Act; and they are to this Effect, That all that Precinct or District of Ground, within the Bounds and Limits there mentioned, from thenceforth, should be a Parish of it self, by the Name of the Parish of St. James's, within the Liberties of Westminster; and a Church thereupon built, is dedicated by the Act, to Divine Service, and that there should be a Rector to have the Care of Souls inhabiting there; and then after a full Commendation of the Merits and Services of Dr. Tennison in that Place, the now Reverend the Bishop of Lincoln: It doth Enact and Ordain him to be the first Rector of the same; and that the said Doctor and his Successors, Rectors of the said Parish, should be incorporated, and have a perpetual Capacity and Succession by the Name of the Rector of the said Parish Church; and by Virtue of that Act, should be enabled by the Name aforesaid, to sue and be sued, to plead and to be impleaded, in all Courts and Places within this Kingdom, and should have Capacity to hold and enjoy, purchase and acquire Lands, Tenements, and Hereditaments, to him and them, Rectors thereof, for ever, over and above what is given and settled by that Act, to any Value not exceeding 200*l.* per Annum.

Then it Enacts, That the Patronage, Advowson, or Presentation after the Decease of the said first Rector or Avoidance thereof, shall or should belong and appertain, and by that Act shall or should be vested in the said Bishop of London for the time being, and his Successors, and in Thomas Lord Jermyn, and his Heirs for ever.

Then it Enacts, That the first Rector, after such Decease or Vacancy, shall be presented or collated by the Bishop of London for the time being; and the next to succeed him, shall be presented by the Lord Jermyn and his Heirs, and the two next succeeding turns by the Bishop and his Successors, and the next turn to the Lord Jermyn and his Heirs, and then the like Succession of two turns for one to the Bishop and his Successors, and of one turn to the Lord Jermyn and his Heirs, for ever after. This is the Act.

Now 'tis to be considered, That this Law doth bind the King, and would bind him in point of Interest, if he had been Patron of St. Martins in Right of his Crown; and if a Right or Interest of the Crown shall be bound by an Act of Parliament, a Prerogative shall be in no better plight. It cannot be said, That he shall not be obliged by it, because not named; for tho' and where he is not named, he is bound by Multitudes of Statutes, according to the 5 Rep. 14 and 11 Rep. 68. He is bound by all Acts generally speaking, which are to prevent a Decay of Religion; and so he is bound by Acts, which are for further Relief, or to give a more speedy Remedy against Wrong.

It is no Objection, that this Law is in the Affirmative; for that it is introductive of a new Law in the very Subject, that is created *de novo*. Then before this Act the King had no Right over this; and if he hath now any over it, he can only have it, how, when, and as the Act gives it, not contrary to it; then the Bishop was Patron of the Place, out of which the Parish is created; And the Bishop can claim no other Right, than what the Act gives him, Bro. tit. Remitter 49. 'tis so agreed 1 Rep. 48. and in 3 Rep. 46. if Lands be given in Fee to one who was Tenant in Tayle, his Issue shall not be remitted, because the latter Act takes away the force of the Statute *de donis*.

Suppose he had been Enacted to be Patron of a Living, to which he had a former Right, there could be no Remitter, because as to particulars the Act is like a Judgment, and estops all Parties to claim any thing otherwise than according to the Act; and yet Remitter is a Title favoured in the Law, then if he have this only by force of this New Act, and another Person should present in his turn so given, 'twould be an Injury, if a Subject did it, and consequently the King cannot do it; for the Prerogative which this Act gives, or which the Common Law gives, is not yet come to take place.

Tho' this be an Affirmative Law, yet according to the Rule taken and agreed in *Stiles* and *Drake's Case*, 100. 298. being introductive or creative of a new thing, implies a Negative of all that is not in the purview, and many Cases are there put to this purpose.

Then also it being particular and express, it implies a Negative, because this and the other are inconsistent;

But First, 'Tis observable all Prescriptions and Customs are fore-closed by a New Act of Parliament, unless saved. Suppose there was an Act of Parliament in Force before this, viz. That the King should present; yet another Statute Enacting somewhat new and inconsistent, will carry a Negative; and if so, in Case of a former Act, there's almost as much Reason for a Prerogative: It must be agreed, That a Man may prescribe or alledge a Custom against an Act of Parliament, when his Prescription or Custom is saved or preserved by that or another Act; but regularly a Man cannot prescribe or alledge a Custom against any Act of Parliament, because 'tis matter of Record, and the highest and greatest Record which we know of in the Law, 1 *Inst.* 115.

Suppose Money were by the Law payable annually, and an Act comes and says it shall be paid Quarterly, by even and equal Portions at the four Feasts, for the first Year, this will certainly alter the Law. 'Tis true,

That a consistent Devise or Statute, is no Repeal or Revocation; but if a new Act gives a new Estate different from the former, this amounts to a Repeal, *Fox and Harbourn's Case*.

The same Rule holds even in Case of the King as in the Archbishop of *Canterbury's Case*, 2 *Rep.* 46. and agreed to in *Hob.* 310. The Query was, if the Lands came to the King by 31 *H.* 8. *cap.* 13. or by the Stat. of *Edm.* 6. and objected, That the latter was in the Affirmative; yet held, That it came by the latter, because tho' they were Affirmative Words, yet they were differently penned; and the last being of as high an Authority as the first, and providing by express Words, That by Authority of that Parliament they should be in actual Possession of the King, held that they should be in him by force of that last Act; and Reason will warrant these Differences, because if otherwise, Inconsistencies and Contradictions must be allowed.

Then this is a new Law in the whole; 'tis a new Parish, 'tis a new Advowson; and in truth 'tis no Advowson till the Avoidance; nay, by the words of the Act (if any difference can be in an instant, between, at and after, as our Law in several Cases allows it, as *per mortem* & *post mortem*, Devise by Jointenant, &c.) there's no Patronage fixed, 'tis no Advowson until after the Avoidance; for so are the words; after the Avoidance, the Advowson,

vowson, Patronage, and Presentation shall be vested, *foret vestit* in Episcopo Lond' & Domino Jermyn, and still then 'tis vested in no Body; and that which is in no Body, is not at all; unless it be, as some times for necessity sake we say, *in nubibus*, or *in abeyance*; but to say that an Advowson shall be in abeyance, before 'tis created or ordained to exist or be at all, must favour somewhat of Absurdity: Now the King can have no Prerogative turn upon an Avoidance, by a Promotion, but when the Patron's Clerk was promoted and preferred; and here is no Patron till that Avoidance happen. They say 'tis vested immediately, tho' to take possession hereafter, as a Reversion granted *cum acciderit*, according to 3 Cro. 323. and 1 Saund. 147. But that's not this Case; for there is a present Grant; here the words are, *After the Avoidance shall be vested, and not before*; and being a new thing it may be so; as a Rent-charge *de novo* may be granted to take effect *de futuro*, but cannot be so of an old Rent.

2. Dr. Tennison comes not in by the Patron's Presentation, but by Donation of the Parliament; and there is not any President for a Prerogative to present to a Donative upon a Promotion: The King cannot present to that, which the Patron could not have presented to; and the Patron could not present to a Donative, *quatenus* a Donative; and for the King to present to a Donative, is to injure the Patron; for 'tis to make that Presentative, which was never intended by the Patron to be so: And yet in Case of a Donative with Cure of Souls (as it may be of a Parochial Church, tho' exempt from Ordinary's Jurisdiction, according to Yelverton 61. 2 Roll. Abridg. 341.) the Ordinary may compel the Patron to Collate some body, as was held in Case of the Rectory Parochial Donative of St. Burian's in Cornwall; and the Tower of London is with Cure of Souls, 1 Cro. 330. 2 Roll. Abridg. 331. 1 Inst. 144. The same will be void by a Promotion of the Incumbent; for 'tis not merely the change of Inferiour into Superiour that makes the Avoidance; for then an Incumbent, made Bishop of another Diocese, or in Ireland, would not avoid the Benefice; but 'tis the Doubtfulness of the Charge, contrary to the Council of Lateran, which hath been received here. This is more different from the pretended Notion and Reason of this Prerogative, then that Case of a Common Donative; for in Case of a Donative, there's an Incumbent of the Patron's own preferring, who is further promoted by the King, and still in being, and the same Patron claiming a Right to fill the same: Here 'tis an Incumbency by Gift of the King, Lords and Commons. And then, if it be considered what this new Prerogative is, for so it must be termed, since there's no footsteps for it in the old times, and the Statute of *Prerogativa Regis* (which enumerates most of them, and is rather a Collection of old Prerogatives then a new Statute) mentions it not; 'tis a Prerogative to present upon the Promotion of the Patron's Presentee, or Incumbent presented in his Right; here is no such thing; 'tis

as their Books say, when the Patron's Presentee is advanced to a greater Dignity in the Church; and the pretended Reason given for it to avoid the Objection, That no Prerogative is to be injurious, or to import a Wrong done to the Subject, is this, That here's no Injury to the Patron, but a Kindness to his Friend; because the Person which he chose and preferred is bettered, and further preferred to an higher Degree of Honour and State in the Church; all this fails here; so that there doth not seem to be the same Colour, why the King should have it in this Case.

It is a good Argument, according to Mr. *Littleton*, That because no such ever was before, that therefore of right it ought not to be: And if no Practise hath been to warrant it, in Case of a Gift by Act of Parliament, there's no reason it should be allowed in this Case; for a Prerogative never used, can never be with Propriety called a Prerogative; much less reason have they for it, if they have no Practise or Presidents to warrant their Claim in case of any Donative.

Prima facie the Patron hath the right; to evade that right of his Mr. Attorney pretends to a Prerogative; then it being of common right with him, they ought to demonstrate that there is such a Prerogative to controul that right in this particular Case, and the Arguments brought for it ought to be clear, convincing, and undoubted: Now because where a Patron's Presentee is preferred by being consecrated a Bishop, the King shall present, that therefore where the Parliament's Presentee is preferred, the Patron shall lose the benefit of his Presentation, is a *non sequitur*, because the Cases are not the same; for the supposed Recompence or Consideration in the one, holds not in the other: This is not the Case of a Prerogative incident to the Crown, from the Necessity of Government, nor is it a Prerogative which respects the Continuance or Improvement of the Revenue, so as for the benefit of the Kingdom; an Extent or Enlargement of it beyond former Practise, may seem absolutely needful; and therefore the common pretences of Intendment and Presumption, are no more on their side then upon this; nay, 'tis rather otherwise, because that common right is with the Patron.

It is no Objection to say, That there never was such a Promotion or Avoidance before; whether there were, or not, is not material; but that rather turns upon them, for that Evinces beyond dispute, that there never was such a Prerogative presentation in Fact as they now contend for, *Argument à simili* is the weakest, but they have no Case like this; nay, they have no Opinion in the Books declaring on their side; nay, the Book Definition of this Prerogative, as was said before, is only to present to a Benefice, vacant by promotion, that was antecedently presentable; here the whole Kingdom is Patron, and all that they can pretend to, is when a Man is dignified by promotion, who came in by Presentation or Collation, and not otherwise.

It is not at present proper to argue when this Prerogative shall begin or commence upon this Church, or if ever; 'twill be time enough to dispute that, when another Occasion offers it self, when the Doctor, or any of his Successors, happens to be preferred to the same State, as his Predecessor is. It suffices to maintain that this turn belongs to the Bishop of London.

This is not an Advowson created, as others usually are. First, As was observed before, no Advowson is fixed, or vested, or created, but *in futuro*, the same Person is made a Pluralist by Act of Parliament, tho' the Act it self says the Parish was too great for one Cure.

Then 'twas observed, That this is not a Patronage turn; it must be admitted that this Act vests the Fee-simple of this Advowson in the Lord *Jermyn* and the Bishop of London, and in their respective Heirs and Successors by turns, *viz.* to the Lord *Jermyn* one, and to the Bishop two successively; and so the Succession is enacted to be for ever; now this is not one of those Patronage successive turns, but it is a particular Presentation which is given to the Bishop of London by express Limitation, and the penning is different. The first, about which the present Contest is, is to be by the Bishop of London for the time being; then the successive Presentations of one and two, are to be, one by the Lord and his Heirs, and the two by the Bishop and his Successors; so that there is no words in the first that looks like the Gift of an Estate, but 'tis only one first particular Presentation, given to the Bishop more then ordinary: It is not one of his turns, which he is to have as Patron, by two to one: But first he is to present one, before ever it comes into the form and manner of turns prescribed by this Act, in perpetual Succession: For if otherwise, the Patronage would be to the Bishop three turns in four, to one of the Lord *Jermyns*.

As to their Objection, That a Patronage newly created shall be in the same plight, and under the same Rules and Circumstances and Incumbrances as another; that Objection can never take place, before it becomes a Patronage, which this was not: And 2. with a stronger reason, it can never take place, till it hath been presented unto: 3. It can never take place, where a particular Presentation is at first given by express words.

The words are, *The first Rector shall be Collated by the Bishop for the time being, and then the Succession*; and it is always to be remembered that 'tis an Act of Parliament. Now suppose the Act had said that the Patronage, after an Avoidance, should be vested in A. and B. but that the first Rector, upon that Avoidance, should be presented by J. S. a third Person; this could never be reckoned a common ordinary turn, subject to the like Prerogative as others: The Bishop here claims not this particular Presentation in right of his Patronage, whereby he is to have two turns to one; but by express Gift of the Parliament.

Suppose the King had been Patron of *St. Martyns* in his own right, no Man would say, that this Act, thus creating of a new Parish, a new Rectory, and a new Patron, would not have bound him.

Surely the King's Assent as Supream or General Patron, is as much implied in this Act, as it would have been, had he been a particular Patron of the Church of that Parish, out of which the new one is taken: Here the King himself gives the first Presentation to the Bishop of *London*; for the King and People, all together, the whole Kingdom are Donors or Grantors of this first Presentation to my Lord of *London*.

Suppose such a Right as this is, were in a Subject, and he were able to prescribe for it, he must then have set forth, that time out of mind, wheresoever any incumbent of anothers Presentation was preferred by him to another Living, that he should have the Presentation *ea vice*; this is the most that could be made of it. Would any Man say, That this Case would fall under that Prescription, or the reason of it. Now tho' a Prerogative be part of the Common Law, and not like a Prescription; yet every Prerogative hath its Boundaries and its Limits, and a Reason for it too; or else 'tis no Prerogative, that our Law allows of.

Besides, there's good Reason in Fact, for this Provision of the first Presentation, because the Act takes notice of the Parish of *St. Martyns*; out of which, this Parish is taken, and the Bishop of *London* was Patron thereof, and at first there's the same Incumbent of both, *Dr. Tennison*: Now the Patronage being formerly in the Bishop, and in the Successive Patronage, created of this new Church by this Act, there's one turn in three given away from him to a third Person, then this Presentation out of turn is at first given to the Bishop of *London*, in Consideration of the third turn given to the Lord *Jermyn* afterwards.

Then there's another thing deserving of notice, in this Case, and that's this; That one and the same Person being incumbent of both Parishes, the King hath had the Effect of his Prerogative upon the promotion of this very Incumbent, by presenting to that Church, into which he came by Presentation and Induction, *viz.* *St. Martyns*; but here the Prerogative cannot operate, because he came into this by Donation, not of the Patron, but of the Parliament; and consequently as was said before, of the King himself.

Besides, here's no Salvoe of the King's Prerogative, or other Right; and to what end in all private Acts for Sale of Estates, paying of Debts, docking of Settlements, and the like; do the King's Council take Care, always to insert a saving, if the same be not necessary.

Here's a new Estate given, and that to a particular Person, and in a particular manner; and no Person can claim a Right to, in, or over this, but as the Parliament hath given it; as for

instance, in an Act where two Churches are united, as upon the Rebuilding of the City of *London*, the first Presentation is ordered to be by the Patron of the Living, of the greatest Value in the King's Books. The King is Patron of the Living of the lesser Value, as he is of several of them in *London*, he shall not have his Common Prerogative of the first Presentation, which he hath in all other Cases, where his Interest is intermixed with others, as in Case of Coparceners; and the youngest is in Ward, he shall present first; tho' the eldest, by the Common Law, is to have the first turn, and the King's Right is in the Place of the youngest; but yet in case where that an Act of Parliament gives a new Estate, and prescribes a Method, tho' in the Affirmative, the Method limited shall take place against the King's Prerogative of being prefer'd; and the reason is, because it is a new Right which the Act gave to present to the Church, to which the Union was, and consequently it must be taken as 'tis given: And so was it held by the *Civilians* at *Doctors Commons*, before the Chancellor of *London*, and several assistant Delegates, upon a *Caveat* there against Institution, and on Advice of the Lawyers, the King's Presentee acquiesced, and never brought any *Quare Impedit*.

The Argument now is only, as to this one first Presentation, there's no flat Contradiction between the use of the Prerogative and My being Patron for ever; but 'tis a Contradiction, to say, the King and I shall both have the same Presentation.

To say, That he shall have a Prerogative here, is to say, That he shall do a wrong to his Subject, for the Bishop can have no other than this one Presentation; he can have no other in lieu of it, and has no Advantage or Recompence antecedent or subsequent from this Prerogative.

First-Fruits and Tenths are not demandable from this Parish, because no saving of them in the Act to the King; upon passing the Act, 'tis known, That in the Commons House the same was press'd to be inserted, but denied, and the Clause rejected; the same Attempt was made in this House, but to no purpose.

In other Acts for the Erecting of new Parishes, there is generally such a saving, as for *St. Ann's*, and *St. John's* of *Wapping*, and the Act for uniting of Parishes, upon Rebuilding the City, hath a Clause of saying to this Effect: All which shews, That such a saving is necessary, tho' the First-Fruits and Tenths being formerly enjoyed by the Popes, might have been pretended, by Construction of Law, to be a Profit annexed to the Crown by Stat. of 26 *Hen. 8. cap. 1.* all Payments to the Pope having been prohibited by 25 *Hen. 8. cap. 21.* and all Profits and Commodities enjoyed by the Popes thereby annexed to the Crown. Yet neither that Act, nor that other in the same Year (whereby the First-Fruits and Tenths of all Ecclesiastical Livings

vings that then, or thereafter should belong from any Parsonage or Vicarage were granted to the Crown) were ever intended to reach this Parish of St. James's, it being a new Creation by Act of Parliament; and because in the Act no First-Fruits or Tenths are given or saved; and there's as much Reason to argue in that case, for an implied saving, as there is for this Prerogative.

Suppose it should be admitted, That a presentable Benefice created by Act of Parliament, should be subject to the same Rules as others are; yet that will not reach this, because not like other Benefices till once presented to; 'tis a peculiar singular Case, by 2 *Roll. abr.* 342. and 1 *Inst.* 344. If a Patron present to a Donative, it becomes presentative ever after; which shews, That 'tis the Presentation which makes it presentative in its Nature, now here 'tis plainly a Donative till once presented to.

Then it was said, That it is not needful to engage in the Dispute, whether this Prerogative shall prevail against the Grantee of the next Avoidance, according to *Woodley's Case*, 2 *Cro.* 695. or whether that case be Law, for that the same is plainly distinguishable from our Case, for there the Grantee comes in the place of the Grantor, *quoad* that Avoidance, and he can have no better or greater Right than his Grantor would have had, if no such Grant had been made. Here ours is a first Presentation, granted by Act of Parliament.

Suppose the Donors of this Presentation to the Bishop, had named a Person *in Esse*, to have succeeded upon the Death or Avoidance of Dr. *Tennison*; no Man will pretend that this Prerogative should have prevented him, the reason given in the Books cited for that Case of the Grantee of the next Avoidance, is, That the Patron could not grant more or otherwise, than under the Contingency of this Prerogative. Surely they will not say, That the King, Lords, and Commons, were such feeble qualified, restrained Donors; then the Parliament being the Donors, the Prerogative insisted upon, and the express Gift to the Bishop, are contradictory and repugnant, and cannot both be fulfilled.

It is no Argument to say, That if a Vacancy had been in the See, and the Temporalities in the King's hands, then the King must have presented and not the Bishop, and that would have contradicted the Act as much as this; for that had been the same as if the Bishop had presented himself, for the King during that time, was in *loco ordinarij*.

To say, That the Bishop of London hath no more right by the Act of Parliament, than a Grantee of the next Avoidance hath by the Common Law, this surely is no very close reasoning, for there is some difference between the one and the other: Here the Act of Parliament (which hath the King's Consent) gives

gives a particular and exprefs Right, and an Act of Parliament may (as *Coke* faith) alter, change, annul, abridge, diminish, qualifie, enlarge or transferr any Common Law; nay, it hath the Common Law and the Prerogative too, under its Controul.

Upon the whole, it was concluded, That by this Judgment, a new Prerogative is affirm'd to belong to the Crown, and this is extended to a turn after a *Commendam*, which may be a prejudice to all the Patrons in *England*; 2. It destroys and makes uselefs the plain and exprefs Words and Meaning of the Act of Parliament, which gives the first Presentation to the Bishop of *London*, and 3. It confirms the old *Non obstante* Doctrine of *Commendams*, which hath always been acknowledged to be to the prejudice of the Church; wherefore it was prayed, That the said Judgment might be revers'd.

On the other side it was argued, That this Judgment ought to be affirmed; for that, as to the first point, tho' it hath been said to be a new thing, and grounded upon late Presidents, yet it hath been so often adjudged, that it doth not now deserve a Debate; 'twas solemnly settled in *Wright's Case*, and upon Consideration, 2 *Rolls Abridg.* 343, 344. 3 *Cro.* 526. *Moore* 399. That tho' many ancient Authorities have been lost, yet in *Brooke's Presentation at Eglise* 61. there is the Opinion of the Bishop of *Ely* for it. And as to the old Presidents, there's no need of Recourse to them, because continual Usage hath been with the King in this matter; a settled Opinion for an hundred years is surely enough to declare the Law as to this particular: This is sufficient Evidence to prove this Right in the Crown, there being no Judicial Opinion against it. The reason for this Prerogative, is because the King, by the exercise of his prerogative in the promotion, hath made the Avoidance, and it is but changing one Life for another, and possibly the Patron is as near the having another presentation, as before.

It was agreed that this is none of the prerogatives mentioned in the Statute *de Prerogativa Regis*; but then 'twas said, That the prerogative to present by Lapse, is not in the Statute, and yet that is admitted; so that the omission of it there, can be no objection; this is a prerogative that follows a Vacancy occasioned by the exercise of the prerogative, for such it is to make Bishops. The King first made them by the donation of a Ring and Staff, then by a *Conge d'Eslier*, the King gave licence to choose, and approved the person chosen, tho' not by absolute donation, as before. By the 25 *Hen.* 8. the Crown is restored to its ancient Prerogatives, and there are Letters Missive, directing the choice of such a person. In *Wright's Case* in 3 *Cro.* and *Moore*, then was the first time it came in question; and it was debated and considered, and the Judgment upon deliberation settled it with the King. And as to the Objection, that in *Dyer* 228. 'tis said, That he and the rest

of his Brethren thought otherwise; that point was nothing to the Case then in question: But however, 'tis observable that the Queen presented *Anno 6.* and the Patron did not dispute it, as appears in *Woodly's Case*. And in *Owen's Rep.* 'tis said, that several Presidents in *Henry* the Eighth's time were searched. 'Tis true, that in 11 *Hen. 4.* 67. and 21 *Edw. 4.* 33. the King did not intitle himself by virtue of his Prerogative, but by reason of the Temporalties being in his hands; those Cases can influence nothing in this matter, because the King's Prerogative consists not in ousting of himself, but of a Stranger; it is to present in the turn of another upon such a Vacancy, but not where he is intituled himself, there he presents by virtue of his own Interest.

As to the Objection, That the Old Books are silent about this Prerogative; 'twas answer'd, That before the Statute of *Provisors* 25 *Edw. 3.* the King was defeated of his Prerogative by reason of the Pope's Provisions, and therefore the King could not have it; whereas 'tis the Exercise of his Prerogative of Promotion, that gives him this Prerogative of presenting upon this Vacancy by such Promotion; and therefore that Statute was made to prevent all Incroachments; and tho' it was made to that very purpose, yet the Clergy being then so strongly united to the Pope's Interest, the Kings of *England* could not use that Prerogative, and frequent Usurpations were made upon the Crown, till the Pope's Supremacy was denied. The 41 *Edw. 3.* 5. shews that there were such Usurpations. 7 *Hen. 4.* cap. 8. complaint is made of them: and 5 *Hen. 4.* num. 95. *Cotton.* 458. And thus it continued till the Statute about the Supremacy 28 *Hen. 8.* the Kings are to make the Bishops; and then consequently, in point of Law, the right of presenting was restored.

Then 'twas urged, That none of the old Books do mention the King's right to present by Lapse, except in *Cawdries Case*, where notice is taken of a Case in the time of *Edw. 3.* but that is not to be found. *Bro. tit. Presentment* 61. is as much Authority for this as that in *Cawdries Case* is, for the Prerogative to present upon Lapse. And this right in question, having been enjoyed so long, should not now have been questioned.

In 5 *Edw. 2.* *Maynard* 148, 198. there is one Instance of the Patron's presenting again; but then Provisions were common and usual, *Walsingham* 1313. so that supposing the Patron did in those times present, the King was not concerned, because 'twas then only the Pope's right, as was thought, and the Pope might be ignorant of the matter. And from thence 'twas argued, that the practise of those Times cannot be urged as Arguments in the present Case.

Then 2. it was urged, That the King having this Prerogative, he is not debarred of it by the Dispensation to hold it, &c. nor by the Act of Parliament, nor by the King's Confirmation of it. The King by that did transfer no Right to the Incumbent, but merely

meerly did continue him in, and there was no Avoidance, but the same is suspended; and had the Incumbent died, or resigned, during this time, the Church had been void by such Death or Resignation, and had debarred the King of his Prerogative: The Incumbent still remains Incumbent for the time, by force of his first presentation, and so the Dispensation doth prevent the Avoidance: He is not in by force of any Title which the Dispensation gives him, but of his old Title, *Jones* 91. 161. *Vaughan* 18.

3. Then 'twas argued that the Act of Parliament for making this new Parish did not alter the Case. 'Twas said, that the making of this a Rectory in this manner, doth make it subject to this prerogative; and that it was by no means the intent of the Act to debar the prerogative. It is made a Parish and Rectory, such as others are, subject to the Ecclesiastical Laws, as well as any other Benefice, under the obligation to Residence, and liable to the Common Jurisdiction and Censure of the Ordinary; and 'tis to be made vacant by the same ways and means, as other livings are; the words *Death, or any other Avoidance*, prove it to be so: Lapse will prevail upon this Rectory; and that cannot be, but because 'tis made a Rectory, and presentative. It cannot be doubted, but that the next Avoidance might have been granted over by the Bishop of *London*, before any Avoidance was.

Suppose the Bishop of *London* had died, and this Promotion had happened, should not the King have presented by reason of the Temporalties; and yet that is as much out of the Words of the Act, as this is? As to its being a Donative, 'twas said, That the present Rector doth not come in by Donation; and tho' 'tis true, That the King cannot present to a Donative upon such an occasion, the reason is, because the Promotion doth not make a Vacancy of the Donative, it doth not make a Cession, the Parson is not subject to Censures as other Rectors are; he is still in by reason of the Institution of the Founder, so that nothing can be infer'd from thence: Suppose the Incumbency of a Donative had been immediately turned into a Rectory, would not that have subjected it to this Prerogative: 'Tis admitted, That the promotion of the Rector did make an Avoidance; then was cited *Princes Case*, 8 *Rep.* Then suppose it a Donative as to Dr. *Tennison*, at the same time that the Church becomes vacant, the Patronage vests; and then the King's Prerogative shall take place, either *eodem Instanti*, or before: But here the Right of Patronage did vest immediately by the Act; he that is to present when the Rectory becomes void, he is Patron: 'Tis like a Reversion granted *cum acciderit*, there is a present Interest vested; and there's no reason why it should not be so, in Case of this Act of Parliament.

The Stat. of 12 *Car. 2.* for confirming of Livings, makes the then Possessors full and perfect Incumbents, as this doth, were not these Benefices void, if the Parties were advanced to Bishopricks,

ricks, and upon such promotions, did not the King present, undoubtedly he did.

Then 'twas argued, That 'twas never the Intent of this Act to oust the King of this Prerogative; the first Intent was to make a Parish, and establish a Rectory, that was the true design. Suppose the Act had only vested the Advowson in my Lord of London, and had not mentioned the Lord *Jermyn*, would not this Prerogative have been consistent with the Right of Patronage: As to the pretence that the Bishop is to present first, that is only to make a Partition; 'tis an Explanation, That they should not have it in common, but by turns. The holding of Dr. *Tennison* was reckoned as one turn, and the Bishop was to have the next; besides, every Act of Parliament is to be construed according to the Subject Matter, and not further than the Act designs and intends; 'tis plain, from the Nature of the thing, That nothing was designed but to settle the Rectory, and establish the manner of Presentation, according to the Agreement of the parties: General Words shall not oust the King of his Prerogative, since he is not named, 3 *Cro.* 542. *Moor* 540. 7 *Rep.* 32. *Plowd.* 246. *Hob.* 146. Here are no Words which do import any Intention to restrain the King of that Right with respect to this, as he hath with respect to other Rectories. The King's Prerogative doth not interfere with their being two Parishes; this Prerogative must operate upon all presentative Livings, so soon as they are made so.

This can never be pretended to be partly presentative and partly donative; for Dr. *Tennison* was in by Act of Parliament as one presented: Then it being a Cession of a presentative Rectory, whether old or new, 'tis the King's Right to present. *Vernon's Case*, 4 *Rep.* 4. *Plowd.* 127. The Dr. came in not by Donation, but was rather placed in by Parliament, which implies in it the Consent, and all the necessary Acts of the Patron and Ordinary: Suppose the King should grant away his own Advowson during a Plenarty, and afterwards such a Cession should happen by promotion; surely that would not deprive the King of his prerogative, and by the same Reason it ought not in this Case. Wherefore, upon the whole Matter, it was prayed, That the Judgment should be affirmed, and it was affirmed accordingly.

Dominus Rex,

Versus

Reginald Tucker.

WRit of Error to reverse a Judgment given in B. R. for Reversal of a Judgment against T. before Commissioners of Oyer and Terminer, upon an Indictment for High Treason. The Record is to the Effect following:

Ad Gen. Session de Oyer et Terminer tenet pro Com. Somerset, apud Civitat. Wellen. in dict. Com. Somerset, coram Francisco Wythens mil. un. &c. Richardo Heath un. &c. Georgio Strode, mil. un. Servient, &c. et alijs Socijs suis Justiciarijs dicti Domini Regis per Literas Patentes ipsius Dom. Regis sub magno sigillo Anglie confect. eidem Francisco Wythens, Richardo Heath, Georgio Strode, et alijs aliquibus tribus vel pluribus eorum direct. quorum alter eorum prefat. F. W. vel Richardum Heath dictus Dominus Rex unum esse voluit ad inquirend. per Sacramentum proborum et legalium Hominum Com. præd. ac alijs viis modis et medijs, &c. assignat. per Sacrament. Francisc. Warre, Baronet, &c. proborum et legalium hominum Com. Somerset præd. ad tunc et ibid. impannellat. jurat. et onerat. ad inquirend. pro Domina Rege pro Corpore Com. præd. presentat. existit quod Reginald Tucker nuper de Long Sutton in Com. præd. Gen. et Thomas Place nuper de Eddington in Com. præd. Teoman timorem Dei in cordibus suis non habentes nec debitum ligeantie sue ponderantes sed. Instigatione diabolica moti et seducti dilectioni ac veram et debit. obedientiam quas veri et Fideles subditi Domini Jacobi secundi nuper Regis Anglie, &c. erga ipsum Dominum Regem gererent et de jure gerere tenentur subtrahent. et machinant. et totis viribus suis intendunt pacem et Communem tranquillitatem, &c. proditorie compassaverint imaginat. fuer. et intendebant dictum Dominum Regem supremum et naturalem Dominum suum ad mortem adducere et contra dictum Dominum Regem supremum verum naturalem et indubitatum Dominum suum, proditorie levaverunt guerram, &c. contra pacem dicti Domini Regis nunc Coron. et Dignitat. suas ac contra formam Statuti in hujusmodi casu edit. et provis.

Et statim de premissis in Indictament. præd. specificat. superius eis impos. per cur. hic allocut. qualiter se vellent inde acquietari, iidem Reginald Tucker et Thomas Place separatim dicunt, &c.

The Judgment is per cur. hic quod præd. Reginald Tucker et Thomas Place ducantur et eorum uterq. ducatur usq. ad Gaolam dicti Domini Regis Com. præd. unde venerunt, et abinde usq. ad locum Executionis trahantur et uterq. eorum trahatur et super furcas ibidem per

*per collum suspendantur et viventes ad terram prosternantur et uterq;
eorum prosternatur et interiora sua extra ventres eorum et utriusq;
eorum capiantur ipsiq; viventibus ibidem comburantur, et quod ca-
pita eorum et utriusq; eorum amputentur quodq; corpora eorum et
utriusq; eorum in quatuor partes dividantur et quod capita et quarte-
ria illa ponantur ubi Dominus Rex ea assignare voluit, &c.*

And now it was argued on the behalf of the King, That this Reversal was not justifiable; that the Exceptions taken below were many, and as to the Pretence that *secreta membra amputentur* was omitted; the same was not allowed as Error below, by reason of the many Precedents which in the Entries did omit it. That tho' the Practice be common to pronounce it, yet few or no ancient Records do mention it; that in 3 *Inst.* 210. where the Judgment is taken notice of, this is not part *In Plowd.* 387. 'tis omitted, that *Interiora* includes it, *In Bro coron'* 128. 'tis not inserted; That this was never entred as part of the Judgment, till 12 *Car.* 2. Then as to the *separatim allocut'* upon the Arraignment, that was likewise over-rul'd below; for it must be intended a several Demand or Question: And the same is implied in this Entry, as much as if it had been express'd, and the Precedents are both ways. But the main and only Exception, for which the Court revers'd the Judgment, was, That in the Indictment, 'tis not said to be a Fact done *contra ligeantie sue debitum*; and as to this, it was argued, That it was not necessary to use those very Words, That they are not Terms of Art, such as are absolutely necessary; they are not like to the Words *Burglariter, Felonice, Murdravit*, and the like; That *proditorie* implies it, that 'tis plainly apparent to be contrary to his Allegiance; That all the whole Indictment shews it to be so, 'tis not weighing his Allegiance, 'tis against his true natural Liege, Lord and Sovereign, That it appears he was a natural born Subject; That the very Words themselves are only of Aggravation, That they may as well be laid precedent to the Fact as in the Conclusion; That here is that which is Tantamount. That Sir Henry Vane's Indictment was thus, *Cotton and Messingers, Sid.* 328. The Scotch Officers in *Suffolk, Lamberts, Hackshams, Titchburns*, and many more.

That 'tis true, the Fact in the Indictment ought not to be made good by Intendment or Inference; but if there be Words which shew, that the Party owed Allegiance, its enough. An alien Enemy is not indictable in this manner; but here 'tis shewn, That he is a Person capable of committing Treason, and that the Act done was against his Duty and Obedience which he owed as a Subject; That many Precedents have been thus, That *nimia subtilitas in jure reprobatur*; That a Certainty to a common Intent is sufficient, *Longs case*; That in 2 *Rolls. abr.* 82. *contra coron' et dignitat' suas*, is held not necessary; wherefore, and for other Reasons then urged, 'twas prayed, That the Reversal might be reversed, and the King restored, &c.

On the other side, it was argued, That this Reversal was just; That this Arraignment being Joint, for want of *separatim*, makes the Proceeding Erroneous; That the Precedents do use the Word *separatim*; and abundance of Entries were mentioned, as *Leach and Ruthford, et al.* 28 Hen. 8. *Dudely, Gates, and Palmer, 1 and 2 Phil. and Mar.* *Throgmorton and Weddall, 2 and 3 Ph. and M. Peckham and Daniel, eodem Anno.* *Blunt and Danvers, 44. Eliz.* *Earl of Ess.* and *S. eodem Anno.* *Guy Fawkes and Sir Everard Digby, 3 Jac. 1.* *Harrison, Scot, and the other Regicides, 12 Car. 2. 1660.* *Green, Berry, and Hill, for the Murder of Sir. E. Godfrey, 1678.* *Ireland, Pickering, and Grove, 31 Car. 2. rot. 242.* *Whitebread, Fenwick, et al. 32 Car. 2. rot. 224.* *Johnson et al. 2 Will. et Mar. num. 57.* and *Lord Preston and Ashton, Trin. 3 Will. et Mar. n. 16. separatim allocut.* and many more. Besides, the Nature of the thing is such, as requires a several Arraignment, because they may plead several Pleas, and they are several Offences; and tho' they plead in this Case severally, that's not enough; for they ought to be askt severally:

But this was not so much insisted on, as the next Error, the Omission of *secrcta* in the Judgment; 'tis part of the Judgment upon the 25 *Edm. 3.* for compassing, &c. tho' for coining, 'tis only to be drawn and hanged, according to *Morgan's Case, Cro. Car. 383, Stamp. 182. 3. Inst. 15, 17.* *Finch's Law, lib. 2. cap. Treason;* they are all *secrcta membra abscindant*, as well as *interiora*; all common Books have it, as *Bolton's Justice of the Peace, tit. Presidents of Indictments for High Treason, 38, 42.* *Dalton's Justice, p. 335.* *Sheppard's Epitome, tit. Crown,* and all those common Abridgments, &c. *Lord Preston and Ashton's* was drawn by good Advice, *Harrison and al. 12 Car. 2. Ireland, Pickering, and Grove, 1678.* *Whitebread's, 1679.* *Walcot's, 1683.* *Langborn's, 31. Car. 2.* *Colonel Sidney's, 1683.* The Earl of *Stafford's* in 1680. was thus, upon Debate and Consultation with all the Judges, *Dominus Rex, versus Owen, 1 Rolls. Rep. 189, 186.* there 'tis mentioned.

But then it was chiefly insisted on, That the Reversal was to be maintained for the Error in the Indictment; that *contra ligan-
tiam sic debitu* was the general Form; that all the great Men in all Ages, who had been of Counsel for the Crown, had inserted it: That all the Indictments, the first Assizes, after *Monmouth's* Rebellion, which were drawn or perused by *Sir H. Poll* had this Conclusion: That *Ashtons, Crosses, Gaunts, Cornishes, Earl of Staffards, Batemans, Ayliffe, Goodenoughs, Hone, Blagie, Rouse, Armstrong, Sir Robert Peyton, Langbornes, Lord Bellasis, Venner, Harrisons, Fawkes, Sir Everard Digbyes, Patricius Dolphie, Pasch, 44 Eliz. John Tipping, 24 Eliz.* are all thus; and the Prints are so likewise, 3 *Inst. 214.* *Fitzb. Justice, pag. 218.* *Plowd. 387.* *Coke's Entries*

Entries 361. *Cro. Car.* 120, 122, 123. and a great number of Particulars more, which might be cited.

Then 'twas urged that Reason doth require this, for that Treason is punishable as a Breach of Allegiance; that that is the very Essence of Treason; that if the Fact be not alledged to be against his Allegiance, 'tis not Treason; that 'tis by reason of his Allegiance that he can commit Treason; and therefore 'tis, that an Alien Enemy, who was never protected, can't commit Treason, because he owed no Allegiance: and there may be many Acts done, which look like a levying of War, without any Breach of Allegiance; and for that was quoted King John's Charter made at *Rumney Mead*, 18 die Junii Anno Regni 17 *Rof. Pat.* 17. m. 13. a Transcript whereof is in *Matthew Paris* 245. Anno 1215. which Charter was ratified four times within nine years after. The first Confirmation was granted 1 *Hen. 3.* and probably at his Coronation; for there was a Charter dated at *Glocester* 6 Febr. *Rof. Pat.* 1 *Hen. 3.* m. 13. that they should enjoy *Libertatibus Regno nostro Anglie a Patre nostro et nobis concessis*. In the second year of his Reign, he sends a Mandate to the several Sheriffs to proclaim this Charter amongst others: *Rex, &c. Salutem, Mittimus tibi Chartas de Libertatibus, &c. Mandantes quatenus eas legi facias in pleno comitatu tuo, Dat* 22 Febr. *Rof. Claus.* 2 *Hen. 3.* Then was cited *Fox's Acts and Monuments*, ad Ann. 1218. That after *Michaelmas*, this King held a Parliament at *Westminster*, wherein he confirmed and ratified, by his Charter, all the Franchises and Liberties which were made and given by King John his Father. In the seventh year of his Reign, viz. the Sixteenth of his Age, he took the Government into his own Hands; and then the Archbishop of *Canterbury*, in open Parliament, doth mind him of the Oath sworn in his Name by the Earl of *Pembroke* (*Rectore Regis & Regni*) and others, at the Pacification between him and the *Dauphin*, that he would restore and confirm those Liberties to his Subjects, for which the War broke out between his Father and the Barons. Then was quoted what *Henry* the Third promised, when he invited *Henry de Lucy* to come in to him, 1 *Hen. 3.* m. 16. which is in very strange language, if his Allegiance had been broken. Then was cited *Sadler* 262. and *Spelman verbo ligeantia*; and *Calvin's Case*, 7 *Rep.* expounding of that word: and the old *Customs of Normandy*, cap. 43. And the said, and other Authorities, were enforced and amplified in such manner, as is not fit to be remembered.

Then 'twas urged, That as the Subject Matter of this Indictment did require these words, so the Reason of the Law in other Cases did warrant them to be necessary here: that *vi & armis* was necessary, till the Statute of *Hen. 8.* made it needless: and 'twould be strange, that an Indictment for a Trespass, setting forth an Assault and Battery, with force of Arms, should be ill for want of *contra Pacem*, and this should be good, without *contra ligan-*

tie sue debitum : contra formam statuti is necessary, tho' the Fact be alledged, sufficiently appearing to be within a Statute Law. Indictments are not to be made good by Intendment or Implication, *Stamford* 96. *Trin.* 18 *Edw.* 4. 10. *Furatus est* without *felonice*, not good ; *Felonice abduxit* without *cepit*, not good. So for a Rape, *quod ipsam contra voluntatem suam carnaliter cognovit*, without *rapuit*, is ill, 9 *Edw.* 4. 26. and so is *Dyer* 304. *Murdravit* is necessary : No Words or Terms of Art are to be supplied by any other Phrases equivalent or tantamount in Sense, for the sake of certainty ; because if such loose Descriptions should be allowed, 'twould subject Mens Actions too much to the Power of Construction, 2 *Cra.* 20, 142, 187, 527. And in all Indictments for Offences committed, between *Decemb.* 15. and *Febr.* 13. 1688. the Conclusion was *contra pacem regni*. Then was cited *Vaux's Case* 4 *Rep.* 39. 2 *Rolls Abridg.* 82.

Then 'twas said that there were exprefs Authorities for the Defendant ; 3 *Inst.* 11. that the Indictment of Treason concludes thus, 1 *Inst.* 129. is the same, and *Dyer* 144. to the like effect. And what is said in the Margin of the new *Dyer*, is very remarkable as to *Mary Queen of Scotland : Calvin's Case* 7 *Rep.* 6. is full and exprefs, as to the reason of the thing ; and it is founded upon the Difference, between an Alien Enemy and a Subject. *Courteen's Case*, *Hob.* 271. *Hobart* is of Opinion, according to *Calvin's Case*, that Indictment against Alien *amie*, it must conclude *contra debitum ligeantie sue*.

Besides, here are no words which carry the same Sense, or are equivalent to it ; *Praditorie* doth imply a Treachery or Falshood, and that he might be guilty of, and yet not act contrary to his Allegiance ; for at that rate every Breach of Trust, as to the King, would be Treason : *debitum ligeantie sue minime ponderantes*, is not sufficient ; for a Man may not weigh his Allegiance, and yet not act contrary to it : then *contra naturalem Dominum suum supremum verum & indubitat* ; those words in themselves are not necessary, and anciently were not inserted : In old time 'twas only *contra Dominum Regem* ; and 'twill be hard to say, that the use of words unnecessary should supply what is necessary, and hath anciently been used. Those words do only import, that the late King was King of the Place where the Defendant was born and lived ; and cannot make it appear, that his Fact was contrary to the Laws of the Land, and the Duty of his Allegiance, as a Subject to him.

Then supposing it not necessary in the Conclusion ; for, as some Presidents are in *West's Symboleography*, 'tis first, as *contra ligeantie sue debitum levavit guerram*, yet it ought to be in the Indictment, in one part or another. The formal Reason of the Facts being Treason, is because 'tis against his Allegiance, and that ought to be expressed ; all the other Expressions urged on the other side, are at the most but Argumentative, and do not directly affirm the thing which is necessary to make the Offence.

As

As to the Prefidents which are the other way, they are but few; those in the Reign of *Hen.8.* and Queen *Elizabeth*, they are upon particular Statutes; as for denying the Supremacy; taking Orders under the Pope, and the like; they are not *contra ligeantiam* in the nature of the Offence, and there *contra formam statut* is enough: But no Answer can be given to the Case of *Lopez* in *Calvin's Case*; where the Judges met and considered, how the Indictment should be, and agreed to be *contra supremum Dominum suum in Anglia*; and the Conclusion to be *contra ligeantie sue debitum*. Whereupon, for these and other Reasons, it was prayed, that the Judgment of Reversal given in the *Kings Bench* might be affirmed; and it was affirmed accordingly.

**Joseph Eastmond Executor of Henry Eastmond and
Samuel Nayle Appellants,**

Versus

Edwyn Sandys Clerk, Respondent.

Appeal from a Decree of the Court of Exchequer: The Case was no more than this; The Parish of *Yeovilton* consisting much in Pasture Land, and the Respondent having been Rector thereof for Twenty years last past and upwards, and being intituled to the great and small Tythes, and all other Dues within the said Rectory, he did exhibit his Bill in that Court, against the Appellant, *Joseph* in his own right, and as Executor of *Henry* his Father, and against the other Appellant *Samuel Nayle*, for Agistment Tythes, for depasturing and fattening their Oxen, and other unprofitable Cattle, within the said Rectory, from the Year 1677. to the time of exhibiting his Bill, which was in *Michaelmas* Term 1692.

The Appellant *Joseph Eastmond* by his Answer admitted, that he had Assets sufficient to answer the Plaintiffs Demands; and both of them admitted, that they and the Testator had fatted and depastured divers Oxen yearly upon their Lands in the said Parish, but said, that some of them were first used to the Plough, and afterwards fatted when turned off from the Plough.

The Court of Exchequer did thereupon, viz. May 26. 1696. decree Tythe Herbage to be paid for the Appellants and the Testators Oxen and unprofitable Cattle, not used for the Plough; and also for their Oxen and unprofitable Cattle used for the Plough, for and during the time they were grazed and fatted in the Parish for Sale, after they were turned off from the Plough. And now it was insisted on in favour of the Appeal, that the Decree was unjust; and then were quoted some Texts of Scripture about muzzling the Ox, &c. And also it was urged, That that part of the Decree concerning Oxen once used to the Plough, was erroneous; and there were cited all the Cases in the Books for exemption of Plough-Cattle from Tythe Herbage, and that this was double Tything: And it was insisted on, that the Reason for the thing was against it in this Case, because the agistment of these Cattle, was necessary to sustain that labour which promoted the Grain, of which Tythe was paid; that this Priviledge extended to all such Oxen as ever had been used to the Plough; that the exemption did continue after they were forborn to be used at the Plough; for there was the same reason to continue the exemption afterwards, as there could be to allow it during the Interval, when they do not draw the Plough. And for these

these and other Reasons urged, 'twas prayed, That the Decree for Tythe *quoad* such Cattle as ever had been used with the Plough, should be reversed.

On the other side it was urged, That the said Decree is agreeable to the Law, and supported by many Resolutions in the Court of *Exchequer*, that there was a Reason for Tythe in this Case; because these Cattle, tho' formerly used to the Plough, they ceased now to belong to it, and consequently Tythes became due; that there's a Difference in the nature of the thing; for when they feed in order to labour, the Parson hath a Tenth of the Benefit produced thereby, but when they are fatted only for Sale, 'tis otherwise; That this was a settled and allowed Difference in the *Exchequer*; That while the Oxen are working, no Tithes shall be paid for their feeding, because there is Tithes of other things arising by the Labour of such Cattle; but when they do no Work, and are turned off to be fatted and are graz'd, there Tithes shall be paid for the Herbage which they eat, they being no way beneficial to the Parson in any other Tithes: And many Cases in *scacc'* were cited to warrant this Distinction; and 'twas said, That none could be alledged to the contrary, wherefore 'twas prayed, That the Decree might be affirmed, and it was affirmed.

Magdalen Foubert, Widow, Grandmother and Administratrix of
Katherine Frances Lorin de Granmare, Appellant,

Versus

Charles de Cresseron, Administrator, with the Will annexed of
Katherine Granmare, Respondent.

Appeal from a Decree in Chancery, the Case was thus, Peter Lorin (Son of the Appellant) and Katherine de Mandoville came to an Agreement to marry, and that the longest Liver should take all, whether Issue or not: A publick Notary took and entred that Agreement in his Book, and both Peter and Katherine subscribed the same so entred; and then being written fair, they signed it again, and the now Appellant and other Relations subscribed it: They Intermarried, Peter was kill'd in Flanders, and left Katherine with Child; afterwards, she being near her time, thought fit to make her Will, which she wrote with her own hand in French, in these Words,

Quoy que je sois presentement en parfaite santé de corps et d'esprit, cependant ne sçachant de quelle manière il plaira à Dieu de disposer de moy dans ma couche, Je trouve à propos de marquer icy mes dernières volontés: En cas qu'il luy plaise de me retirer de ce monde, si c'est sa volonté de donner des jours à mon enfant, Je luy laisse généralement tout ce qui peut m'appartenir, & supplie très humblement Madame Foubert, ma soeur Lorin et Mr' le Bas d'en prendre soin; J'espère que Mr. Foubert, & le Major, à la consideration de feu son pauvre Pere, luy rendront les services dont il aura besoin, & que Dieu ne l'abandonnera point: Je l'en supplie de toute mon ame, comme aussi de benir toute la famille fait à Londres ce 16th de Novembre, 1693. par moy, Catherine de Granmare: After which the said Katherine annexed a Codicil to her Will, in these words, viz. En cas qu'il plaise à Dieu de retirer mon Enfant aussi bien que moy, Je donne à Mademoiselle le Bas ma bague de Diamans, mon Ecrivoire garnie d'argent, & une boîte de rubans neufs; Je donne à Mademoiselle Peireaus mon habit brun doublé couleur de paille, et mon habit Jaune; une demie douzanie de mes Chemises: Je donne au fils à Jacob dix livres sterlings pour le mettre en Métier, & à son pere ce qui se trouvera des habits de mon Mary: Je donne à Catharine Williams, ma filleule, dix livres sterlings pour la mettre en métier Tout le reste de ce qui m'appartient tant en Meubles, que Linge, Vaissell d'argent, & Argent Monnoye, qui m'est dû, Je le laisse à ma soeur Lorin, & a mes' de Cresseron, pour estre également partagé, entre eux; J'excepte seulement le portrait de mon Cher Mary, ma bague Turquoise, que Je donne à ma soeur Lorin, & la prie de garder l'une & l'autre tant qu'elle vivra: Je donne aussi a
Monsieur

Monsieur Crefferon ma montre d' Or que le souhaite qu'il garde et porte pour l'amour de moy ; fait à Londres ce 16th Novembre par moy Catherine Granmare.

Then she was deliver'd of a Daughter, and a few Hours after died, and the Daughter did survive her near two Years, and then died : And after her Mother's Death (there being no Executor named) Administration of the Estate of the Testatrix was committed during the Minority of the Child with the Will annexed ; but the Appellant possess'd her self of the Estate, being about 600*l.* Value. Then after the Child's Death, the Appellant as next of Kin, took Administration to the Child, and also to Mrs. Granmare.

The Respondent exhibited his Bill, claiming a Moiety of the *Residuum* by force of the Codicil, the Appellant by Answer insisted upon the Invalidity of the Agreement between *Peter* and *Katherine*, but that being waived, the Question arose upon the words of the Will, and particularly these, *donner des jours*, and 'twas insisted, That nothing was designed to the Respondent, but only in case the Child were still-born, or should die in her lying in ; whereupon the Court ordered the Cause to be continued in the Paper, and that both sides should take time to procure the Opinion of *French* Men born, and acquainted with the Laws of *France*, and the Cause coming on again to be heard before the Lord Chancellour ; and upon reading of several Opinions of *French* Gentlemen bred to the Laws of that Country, the Court declared, That the Respondent was well intitled to his Moiety of the Residue, after the particular Legacies, Debts, Funerals, and other Allowances deducted, and decreed the same accordingly.

It was argued on the behalf of the Appellant, That this Decree was erroneous, that the proper Signification of those words, was no more than to give Life, that it was so translated at *Doxors Commons*, That that Translation does agree with the Opinion of several of the most learned Divines amongst the *French* Refugees here ; That 'tis so interpreted in the Famous Dictionary of the *French* Academy, dedicated to that King, where the Words are as follows, *viz. les jours au pluriel, signifie la vie*, That Days in the plural signifie Life, without any Determination of time ; That there are few *Frenchmen* of any Understanding, but will acknowledge, That by *les jours d'une personne*, the Days of one (whether they be many or few in number) must be understood the Life, &c. That the Testatrix here could mean no other by Days, but Life ; when she said, That in case it pleased God to take her out of this World, if it was his Will to give Days, to give Life to her Child, she left it all that belonged to her ; knowing well, That if the Child was born alive, it must be maintain'd from that Moment, out of what was so left it, that it appeared from the Preamble of the Codicil, *viz.*

In case it shall please God to take away my Child, as well as my self, then, &c. That the Testatrix never intended the Estate to go over, unless the Child died as well as her self in her lying in.

Then it was argued from the Nature of the particular Legacies; they were of such a sort, as that they must be given without Sense or Reason, had she not supposed her Child's Death, as well as her own, in her lying in; for otherwise those new Ribbons must become old, which were intended as a Present to a young Gentlewoman, Clothes lockt up in a Trunk would have been of no use to Persons then in Distress, and the poor Orphan had gone too far in Years to learn a Trade. Then other Things are given as Tokens to be kept, and worn by them for her sake, as long as they lived: Now what Reason can be assigned for this, if she did not mean and suppose a Death in her lying in: From whence it was inferred, That the Intention of the Testatrix was to give all she had to her Child, in case she survived her; and if it did not survive her, but was taken away as well as her self, in her lying in, then her Intention was to give that same All (which she had given to her Child) to other People, as specified in the Will; and unless this were the Intention, the Child must have starved, or lived upon Charity, not having the Property of what was left it; and the Condition precedent, according to the Respondents Exposition, excludes the Child till its Years of Discretion; wherefore 'twas prayed that the Decree might be reversed.

On the other side it was argued with the Decree, that the same was just; that no Objection could arise from the Nature of the other Legacies, or of this, as being reasonable or unreasonable; for that 'tis the Natural Right and Privilege of every Person, to dispose of that which they have, at their pleasure, to do what they will with their own; a Privilege so certain, that tho' 'tis used many times to ill purposes, yet the Law cannot interpose, nor restrain the Proprietor, no not to preserve him and his Family from ruine, as daily Experience shews: That it is agreeable to Law and Justice, and to true Piety, to see that the Will of the Dead be performed; and tho' the Law have ascertained how Estates shall go, when there is no Will, yet when there is a Will that disposes of it otherwise, then the Law would do; the Courts below will compel a Performance of such a Disposition, as the Will directs.

Then 'twas said, That the Intention of the Testatrix, in favour of the Respondent, is both Charitable and Prudent; He was her nearest Relation in *England*, and considering a great part of what she left was once her Husbands, she honourably gave as much to his, as to her own Relations, making her Husband's Sister, and the Respondent *Charles*, residuary Legatees to share equally, and so is the Decree: And to Reverse this Decree, and permit

permit the Appellant to go away with the whole, (as she must, if the Decree be reversed) doth directly destroy all the Prudent and Charitable Intentions of the Testatrix, and carries the Estate where she never designed it, viz. to the Appellant.

Then 'twas argued, That the Court of *Chancery* had done well in taking the Opinion of Persons skilled and knowing in the Matter in question; that the Gentlemen of the Long-Robe of that Country, now here in *London*, did all give their Opinions; that according to their Construction of these words in a Will, it was an arrival to Years of Maturity or Age (enabling to dispose; that unless the Child had lived to such an Age, as that she had been capable to give the same away, her Representative in this Case, could not be intitled to it.

Then 'was said, That words are to be interpreted according to the Sense and Acceptation of those which use them: That the Testatrix was a Native of *France*, and therefore this method of Inquiring into her Meaning was just and reasonable: That the Courts at Law have frequently consulted Merchants about the signification of Mercantile Terms, and *Trinity House* about Marine Phrases; so in like manner Grammarians, Criticks, Chymists, and Artificers have been in the Court of *Kings Bench* consulted, according to the Nature of the Thing in question, upon words belonging to, and used in their respective Professions: That in case of words disposing of an Estate in a Foreign Language, by the Will of a Foreigner, the Judgment of Divines or Grammarians could be no proper Direction to the Court of *Chancery*; but the Means of Information must be from those who were acquainted with the Rules of Interpretation in Case of Wills amongst those People: That the Opinion of those Gentlemen was sufficient to justify the Decree.

But then it was further argued, That here the Meaning of the Testatrix could not be such as the Appellant would pretend, *i.e.* that she meant to give her Estate to the Respondent and others, only in case the Child she then went with should be still born, or if born alive, should dye with the Mother in her lying in, for these Reasons: First, For that she was so far from apprehending that the Child would either be still born, or if born alive, would dye as soon as her self, or in her lying in, that she expected 'twould live, and, as she hoped, to full Age, for she takes particular Care of its Education; and earnestly recommends the same to the now Appellant, and others; prays God to bless it, and not forsake it; and hoped that all the Relations on the Father's side would, for the Father's sake, do it all the Services it should stand in need of.

Then taking it that the Testatrix did expect the Child to outlive her, (as unquestionably she did) if her meaning had been such as the Appellant hath put upon her words, the way to have it sure fixt to the Child; and then to the Appellant, had been to
have

have made no Will at all ; because if the Child survived the Mother but a day, or an hour, or never so little, the Law had vested the whole, first in the Child in its own Right, and upon the Child's decease, in the Appellant, as Administratrix to the Child.

Suppose the Child had outlived the Mother for a Month, or the like, what Interpretation could have been put upon this Will ? All their Arguments will hold as well to a Month, Week, or Days surviving of the Mother, as to this of two Years; and therefore it must be thus construed to be her Intent, that the Devises over should take effect, if the Child should not live to an Age of Maturity, and Power of Disposition.

And as to the pretence of the Child's starving in the mean time, there neither is, nor can be any weight in that, for the Interest and Produce of the whole, during all that time, must remain and be to and for the benefit of the Child. Wherefore, upon the whole Matter, 'twas prayed that the Decree should be affirmed ; and it was affirmed.

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Philip

Philip Jermin and Sarah Uxor ejus, Plaintiffs,

Versus

Mary Orchard Widow, Defendant.

WRit of Error to Reverse a Judgment of Reversal given in the Exchequer Chamber, upon a Judgment given in the Kings Bench for the Plaintiffs, in an Action of Trespas for the mean Profits, after a Recovery in Ejectment, and Possession had thereupon: The Case was this upon Record; The Plaintiffs declare that the Defendant, 1 Sept. 1672. their Close, &c. *vi & armis*, &c. did break, and upon the Possession of the Plaintiff did enter, and the Plaintiffs from their Possession did expel and remove, and them so being removed and expelled for a long time, viz. from the said 1 Sept. 1672. to the time of exhibiting the Bill, viz. 6 May 1685. did hold out from the same, by which they lost the Profits thereof, &c. *Et al Enormia*, &c. The Defendant by Plea takes Issue as to the Force, and Issue thereon; and as to part of the Trespas, pleads the Statute of Limitations; and as to the residue of the Trespas, pleads that Sir William Portman made a Lease to one Trowbridge for 1000 years, and by *mesne Assignments* derives a Title down to Thomas Nicholas; and that he in his Life time, by Indenture, assigned to the Defendant.

The Plaintiffs Reply, and as to the first part of the Plea, viz. of the Statute of Limitations, they demur; and as to the other part of the Plea, they tender a Traverse, and deny that Thomas Nicholas did assign the Premises to the Defendant.

The Defendant joyns in Demurrer, as to the first part of the Plea, viz. the Statute of Limitations: And as to the other part, she takes Issue upon the Traverse; which Issue is joyned; and a *Venire* awarded *tam ad triand* the two Issues, *quam ad inquirend de dampnis* upon the Demurrer.

The Jury find that Thomas Nicholas was possessed in manner as the Defendant in her Plea hath alledged, and that he did make Seal, and as his Deed, deliver the Indenture in the Plea mentioned; which said Indenture follows in these words; and so set forth the whole; in which, after a Recital of the Lease, and a Deducement of the Title down, are these words, viz. The said Thomas, as well for and in consideration of the natural Love and Affection which he beareth to the Defendant his Grand-child, as for other good Causes and Considerations, hath granted, assigned, and set over, and by these Presents doth grant, assign, and set over unto the said Mary, her Executors, Administrators, and Assigns, all the said Cottage, Barn, and Lands, and all and singular other the Premises herein before recited or mentioned, with the Appurtenances to the same belonging or appertaining; together with the said recited

†

Lease.

Lease, and all Writings and Evidences touching the Premises, to have and to hold the said Cottage, Barn, and Premises, and every part thereof, with the Appurtenances, unto the said Defendant Mary, her Executors, Administrators and Assigns, from and immediately after the Death and Decease of the said Thomas Nicholas, party to these presents, and Mary his Wife unto the end of the term; and for and during all the rest and residue of the said term of 1000 Years, which shall be therein to come and unexpired, by and under the yearly Rents, Covenants, &c. expressed in the said Original Indenture of Lease. Then the Jury leave it to the Court, whether the Deed of Assignment be good in Law or not, and conclude specially, if the Assignment be not good in Law, then they find for the Plaintiffs, and Assels, Damages, 50*l*. and 40*s*. Costs, and thereupon, &c.

And now it was argued for the Plaintiff; and it was said in the first place, That this Case was extraordinary, that tho' the Majority of the Judges in Westminster-hall were of Opinion with the Plaintiffs, yet they were forced to sue this Writ, they had the four Judges of the King's-Bench, and the then Mr. Justice Powell, and the then Baron Powell concurring with the King's-Bench; and the chief Baron Atkins being absent, the other Five in the Exchequer-Chamber reversed the Judgment, it having been resolved upon the Stat. of *Elin.* which erects that Jurisdiction. That the Concurrence of six are not necessary to reverse, but only that six must be present to make a Court; so that here were six to five for the Plaintiff, and yet he hath lost it.

Then it was argued, That there had been two Things insisted on below, one was the finding of Damages generally, and the other was as to the Validity of the Assignment; and as to the finding, it was said, That the Matter of the Force is meer Form; and if there had been no *non prosequi*, the same could not make an Error; That in C. B. and B. R. the Issue upon the *vi & armis*, &c. is seldom or never taken notice of, no Entry is made of it upon the *posse* at all, unless a wounding or some such other special Matter were mixt with it, in the same Issue; That 'tis held in the Case of *Law and King*, 1 *Saund.* 81. If nothing be answered to the *vi & armis* in a special Plea, 'tis well upon a general Demurrer, and the 7 *Hen.* 6. 13, and 1 *Hen.* 7. 19. are plain, That if the Party have the special Matter which he pleads, found for him, the *vi & armis* shall not be inquired of: So if the Defendant have Judgment against him, upon Demurrer to the special Matter pleaded by him, the *vi & armis* shall never be tried, tho' Issue were joyned upon it, but the Party shall be fined upon the *Capiatur*, &c. without any Inquiry: So is the *King and Hopper*, 2 *Cro.* 599. in a *Scire Facias*, on a Recognizance for the good Behaviour, special Matter pleaded, held, That the Jury need not inquire about the *vi & armis*.

armis, if such Special Matter be found for the Defendant; much more is it so, in case it be found for the Plaintiff, for there the Act which is found imports it, &c. and it shall be intended to be *vi & armis*, &c. and the Book of *Hen. 6.* is full in it, no need of any Inquiry in such Case. And in this Point both the Courts having concurred, the Counsel for the Defendant did not contest it.

Then as to the other Matter of the Damages, which should have been inquired of upon the Demurrer, 'twas said, That they were released upon Record; and, 'tis plain, that the Jury have found nothing upon that, because the Conclusion of the Verdict doth shew, that they inquired and found Damages only as to the *concessit* or *assignavit*; they assess Damages for nothing else; for if the Deed did pass the term, then they find for the Plaintiff, and assess Damages; and if the term did not pass, they find the Defendant Not guilty, &c. the Damages cannot therefore be for both; for if they had found any for the Matter demurred upon, it must have been with a *si Contingat*; here 'tis not so. And tho' the Special Fact found had been against the Plaintiff, it might have been for him upon the Demurrer, and consequently the conditional finding of the Damages here, can never be as to that.

Then it was further said, That this might be supplied by an Inquest of Office, in case it had not been released; and there was cited *Cheyney's Case*, *Mich. 10 Jac. 1.* 10 Rep. 118, 119. *Writ de Valore maritagij*, Issue on the Tenure, and Verdict for the Plaintiff, and no Value found of the Marriage; and held ill, because they say, an Attaint lyes upon it, that being the Point of the Writ; and there the Rule is taken generally, that where an Attaint lyes upon the finding, the omission of finding such Matter cannot be supplied by a new Writ of Inquiry, because such Writ of Inquiry would prevent the Party of the Benefit of his Attaint.

Then the Book says further, That the Rule is, that the Court *ex Officio*, ought to inquire of such thing upon which no Attaint lyes; and there the omission of its being found in the Verdict, may be supplied by a Writ of Inquiry of Damages; as in the case of a *Quare Impedit*. (*Poyner's Case*, *Dyer* 135.) Issue found for the Plaintiff; but the Jury *per negligence* were not charged to inquire of the four Points, *Plenary*; *ex cunctis Presentatione*, *si Tempus Semestre*, and the yearly Value of the Church; there a Writ of Inquiry lyes *de novo*, because upon them no Attaint lyes; as is the 11 *Hen. 4.* 80. because as to them 'tis only an Inquest of Office; and the Book says further, That all the Cases to the contrary of that Rule have passed, *sub silentio*, without due Advise-ment, and were against the Rule of Law: So in the Case of *Destinnee*, the omission of the Value in the finding is fatal, because an Attaint lyes upon a false Verdict in that particular: So that by the Case cited, it may be only an Inquest of Office as to part, which is the present Case. In that Case of a *Quare Impedit* in *Dy-*

er, is cited a President for it, in the *Old Book of Entries*, 110. which is a false Folio, for 'tis in 92. b. and there is the very Entry of the Writ, setting forth a *Recuperavit presentatione virtute Brevis de Nisi prius, Et quia nescitur utrum Ecclesia plena &c.* And as the Case is in *Dyer*, the Plaintiff did there (as the Plaintiff doth here) release his Damages, and had a Writ to the Bishop. Now in *Heydon's Case*, 11 Rep. 6. 'tis held that no Attaint lyes upon an Inquest of Office; and therefore 'tis, that if in a Trespass against divers Defendants, some plead to Issue, and one suffers Judgment to go by Default, the Damages found on the Issue shall be chargeable upon all, and the Inquiry of Damages on the Judgment by Default shall stay, because no Attaint lyes upon that. 'Tis there also said, that attaint lyes only on a Verdict on the *issue* of the Parties: In Trespass, three Issues, *Non culp'* to one part, Prescription for a Common to another part, and the Cattle *raptim non orderunt* in going to take Common to another, &c. The Jury find one for the Plaintiff, and another for the Defendant, and inquire not of the third Issue at all; the Plaintiff relinquishing his Damages on the third Issue, prays Judgment on the Verdict for the first, and held that this prevented all Error, *Mich. 13 Car. 1. B. R. Brown and Stephens*, adjudged, 1 *Rolls Abridg.* 786. Then as to the Case of *Vastinian and Row*, 11 Car. 1. B. R. in 2 *Rolls Abridg.* 722. Trespass for an Assault, Battery and taking Corn; Special Plea to the Battery, and Demurrer thereupon, and *Non culp'* to the taking the Corn; the Jury find no Damages upon the Demurrer; said there, That when Judgment is for the Plaintiff on the Demurrer, the Damages for it cannot be assessed on a Writ of Inquiry; but a *Venire Facias de nova* for the whole: 'Twas now argued, that that was expressly against the Rule in *Cheyne's Case*, and that in the Case in *Rolls*; 'tis put with the addition of a *dubitatur*.

But if that be Law, there needs no Writ of Inquiry in this Case, because the Damages, as to that part, are released; and for this, there is the express Case of *Bentham*, 11 Rep. 56. In Annuity, the Parties descended to Issue, found for the Plaintiff as to the Arrearages, but no Damages and Costs; 'twas held an imperfect Verdict, and that it could not be supplied by Writ of Inquiry of Damages; yet the Plaintiff releasing the Damages and Costs had Judgment for him; and a Writ of Error was brought, and the Insufficiency of the Verdict was assigned for Error; but the Judgment was affirmed, because the Plaintiff had released it, *Dyer* 369, 370. *Ejectione custod' terre & heredit'*, and ill, because intire Damages; and for the *heredit'* no Ejectment lyes; yet the Damages being released, he had Judgment for the Land. And 'twas said to be there held, That insufficient finding of Damages, and finding of none, are all one. If a Release of that which is ill found, will help, where such thing released is directly in Issue; much more it should do so, where the thing released is but obliquely inquired of, and was not put in Issue to the Jury; and then 'twas repeated what was said before, that the Special Conclusion helps

and

and prevents the General Intendment which otherwise would be had, as to the Damages being inure, and therefore 'twas insisted that this made no Error, but the Judgment in the *Kings Bench* stood good, notwithstanding this Exception. Then the Counsel for the Defendant did likewise wave this, as not being the Cause of the Reversal in the *Exchequer Chamber*.

Wherefore it was argued for the Plaintiff, That this Assignment or Grant found in the Verdict is void, and passed nothing; for that either it passed the whole Term, or no part of it, and that immediately; that this must be agreed. Then 'twas said, that it could not pass the whole; for so to do, was contrary to the Intention of all the Parties, to the good will of the Grantor, and even to the hopes of the Grantee; for 'tis plain from the whole Contexture of the Deed, that the Defendant was to have nothing in the Term till the Death of the old Man and his Wife: It was undoubtedly the meaning and design of all the Persons concerned, that the Defendant only should have the Residue after his decease.

Then that the Law will not permit this, is plain from the Books, for that 'tis uncertain, how much, or if any of the term will remain, or be in being, at the death of the Grantor or Assignor; that the Law rejects such a small or remote Possibility; that Man's Life in the Eye of the Law is of so great a regard, that 'tis presumed to be of a longer duration than the longest term of years: That this is an old Maxim, upon which Thousands of Properties do depend, that tho' some Mens reason may not approve it, 'tis not to be altered but by the Legislature; that the Law first prefers Inheritances, or Estates descendible; then Freeholds, or Estates for Life; then Chattels real or Terms for Years: The Law values and regards, what a Man and his Heirs shall enjoy, before that which he himself only can enjoy; and what he himself may enjoy during his Life, before what he may have only for a certain limited time, the which he may by any supposal survive: These are known Truths. 32 *Aff. 6. Plowd.* 521. If a Man be possessed of a Term for 100 years, and grants so many of them as shall remain at the time of his death, this is void for the uncertainty; otherwise if it be by Devise, because there nothing takes effect till death, and then 'tis certain how many years he is to enjoy it. 'Tis true, a Lease of Land for Forty years, to commence after a Man's death, is good, because 'tis certain that the Land shall be enjoyed for Forty years, but here *non constat* in certain, that this Deed could take effect for a year, an hour, or at all; *Bro. 119. Lease 86. Plowd.* 520. A Man possessed of a Term, grants it to another during Life, 'tis as much as during the whole Term (tho' never so long) because Life is presumed longer; so if he grant all the Term that shall remain after his Death, 'tis all void, because he reserves to himself the whole; for a greater includes the less; and for Life is the longest of the two: These things are not to

be disputed : If both Premises and *Habendum* had had this Limitation, the other side must have agreed it to have been void *ab origine*, and nothing to have passed by this Deed.

But then the Objection is, That the whole Term passes by the Granting Part, and then the *Habendum* is void, because 'tis repugnant. To this it was answered. That in a Deed each part hath its proper Province: The Office of the Premises is to express the certainty of the thing granted; the *Habendum* is to express the quantity and limitation of the Estate, 1 *Inst.* 6. *Plowd.* 196. *Loffield's Case*, 10 *Rep.* 107. And according to *Littleton's Text*, *Sect.* 370. all the parts of the Indenture are but one Deed in Law: from whence it was inferred, That the *Habendum* is never to be rejected, but when there is a manifest, express, and particular Contradiction; never when the *Habendum* doth apparently shew the Parties Intention.

Here the Lessee for years grants *totum Cottagium suum*, &c. The Grantee or Assignee (if there be no *Habendum*) hath but an Estate at will; whereas if he grants all his Estate and Interest in such a Cottage, there the whole Term passeth. This is the express Opinion in *Griffin's Case*, 2 *Leon.* 78. *Case* 102. and there said to have been lately so adjudged in *Wynnibank's Case* in *B. R.* Now here's nothing in the Premises, but what is general, not the whole Estate granted; nor is it said for how long time he shall enjoy it; and therefore the *Habendum* cannot be said to be repugnant or contradictory, because the first is not express.

In *Stukely's Case*, *Hob.* 170, 171. upon the Case of Grants and Exceptions, is the learning of *Habendums* laid down, if it had been a Grant of all his Estate, *Habendum* after his Death, there the *Habendum* shall not frustrate the Grant; but if the Premises give no certain or express Estate, there you may alter and a bridge, nay, you may utterly frustrate it by the *Habendum*; these are the words of the Book: Then was cited 2 *Rolls abr.* 66. and 1 *Inst.* 48. *b.* and the same Case of *Hodge and Crosse*, in 3 *Cr.* 254, 255. where 'twas ruled, That the *Habendum*, tho' void, shall controul the implied Limitation in the Premises; 'twas a Feoffment of Lands in *London*, *Habendum* to the Feoffee and his Heirs after the Death of the Feoffer: And 'twas argued in that Case, That the *Habendum* was void, but resolved, That nothing passes, because it appears to be the Intent of the Party, that nothing should pass but *in futuro*; for the Premises could pass nothing but by Implication, and that was nothing at all, because the Intent was to pass nothing presently; and tho' there were Livery made, yet that Livery could operate only *secundum formam Chartę*, and therefore the whole was void; the reason was, because the first was General, tho' the Law would have given a particular Estate for Life by the Livery; yet because the Party gave none expressly by particular Words, the *Habendum* was not to be rejected; many of the Rules in *Buchler* and *Harvey's*

vey's Case, 2 *Rep.* 55. are applicable to this: And altho' there be a Difference, where the Deed passes the Estate, and where Livery or other Ceremony is requisite, as to many purposes; yet still the Distinction is, where the Premises do not give all the Parties whole Interest, or some other particular Estate, but is General, there the *Habendum* shall not be rejected as repugnant, 2 *Rep.* 23, 24. *Baldwin's Case*.

As to the Words, together with the said recited Lease, that can only mean the Indenture or Writing; for the Adjective *recited*, implies the Intent to be such: *Recited* signifies only a Rehearsal or Repetition of Words, spoken or written before; and so is *Recitare Testamentum*, *Calvin's Lexicon*, and 'tis joined with the other Writings and Evidences concerning the Premises, and doubtful Words are to be construed according to the Nature of the things expressed and mentioned with them: Lease in it self imports only the Conveyance or Instrument of Conveyance, not the Interest in the thing conveyed; if by Writing, 'tis called a Deed or Lease in Writing, if otherwise, a Lease Parol: Thus is it explained in *Blunt's Law Dictionary*, and in *Knight's Case*, 5 *Rep.* 55. where all the Parts of it are described: A Man may give away his Lease, and yet retain his Estate or Term, he may deposite it as a Pawn or Pledge; and the Party in whose Custody 'tis so lodged, may maintain Trover or Trespass, if it be taken from him, nay, against the Lessee himself, the Owner of the Lands, if he takes it before the Performance of the Condition; so that these Words cannot alter the Case; this is not the Case of a Will, but of a Deed Executed in the Lifetime of the Party; the Rule, and the Reason of the Rule about Exceptions in Grants, will hold to this; where the Grant is General, the Exception cannot be rejected as void, on pretence of Repugnancy: The Common Law doth not care to raise, or make Estates by Implication where the same Person hath an express one, so is *Vaughan*, 261, 262. therefore there's no Reason in this Case, to construe the whole Term to pass by Implication in the Premises, a particular Estate being limited in the *Habend'*, and that not being good, all is void: Here's no Purchaser, Creditor, or Heir in the Case, but 'tis a meer voluntary Act to the Defendant.

Then was cited 1 *Cro.* 376. 2 *Bulstr.* 272. of a Copy-holders Surrender, *Habend' a tempore mortis*, and held void; wherefore upon the whole, it was insisted, That by the Premises, nothing passed but an Estate at Will, That the *Habend'* giving an Estate or Interest, which was not allowable in the Law, the Deed was void, and passed nothing; and therefore the Verdict was for the Plaintiff, and the Judgment in *B. R.* was good, and accordingly it was prayed, That the Reversal of that Judgment might be reversed.

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On the other side, it was argued, That to construe this to be void, was contrary to the Intention of both the Parties; That now the Grantor and his Wife were dead, and there was no dispute about their Estates: That the Premises here passed the whole, 'tis to her and her Executors and Assigns, 'tis all that Cottage; 'tis together with all his Deeds concerning it, the Deeds are concomitant with the Estate, and when he grants the Deeds, he certainly did design to pass his Interest; he could never mean an Estate at Will, when he names the Executors, &c. Then was cited the Case of *Lilley and Witney*, *Dyer* 272. pl. 30. Grant of all his Interest, Estate, and Term, *Habend* after his Death, the *Habend* is void, *Plowd.* 520. *1 Bullstr.* 191. *Bro. Grants*, 154. Leases 66. The Presumption that a Man can outlive a 1000 Years, is a weak Pretence, and void of Reason: Equity is a part of the Law of the Land; and here to judge this void, is unconscionable and unreasonable. Then was cited *1 Anderson*, 284, 290. Grant of a Reversion *Habend* after his Death, shall vest immediately; the Lease imports and carries the Estate, *Peto and Pemberton*, *1 Cro.* 101. Plea, That he had surrendered his Lease, which shews, that it carried the Interest, they are Synonymous, *Bro. tit. Grant* 155. A Man grants *omnia firma sua*, shall pass his Term: There's no prescribed Form for passing a Chattel before the Stat. of Frauds. A Man possessed of a Term, grants it to another and his Heirs, it passeth the whole, so to a Man for Life; it shall pass the whole Interest, and shall go to his Executor, *Plowd.* 424. *3 Cro.* 534. If the *Habend* were out of the Case, this would pass the whole, and if so, the *Habend* is void; 'tis an old Rule and a good one, *Ut res magis valeat quam pereat*: The Lord Chief Baron *Hale* seem'd of that Opinion in the Case of *Smith and Tutebitt*, *in scacc* (but that proved a Mistake, for that Case was different, and was ended by Consent, as appeared by a Rule, *Die Mercurij* 13. *Die Maij*, *Term Pasch.* 26. *Car.* 2. after *Hale* was removed into the *Kings Bench*.) Then 'twas said, that there could be no ill Consequence in adjudging this to be a good Assignment; the like case was never probable to happen again, that here had been a Diversity of Opinions below Stairs, that Equity was with the Defendant, and therefore 'twas prayed, That the Reversal might be affirmed; and it was affirmed accordingly.

Bennett Swayne, Esq; Petitioner.

Versus

William Fawkenor and John Lane, Executors of Benjamin Middleton, Defendants.

WRIT of Error to Reverse a Judgment in the Kings Bench given for Benjamin in an Action against Swayne for 20 l. received by him of the Profits of a Share in the New-River, &c. The Case was thus;

Simon Middleton Esq; being seized in Fee of Seventeen Thirty-six Parts of the King's Moiety in the New-River Water, and having Issue eight Children, viz. *Hugh, Sarah, Hannah, and Anne,* by his first Wife; and *Elizabeth, Rebecca, Benjamin, and Hese-kiah* by his second Wife, made his last Will, and thereby amongst other things, to the intent that all his younger Children might be provided for, he devised Seven Thirty-sixth Parts or Shares of the King's Moiety aforesaid amongst them, in manner following; viz. to *Sarah, Hannah, and Anne,* to each of them and their Heirs, one full Thirty-sixth Part or Share of the said King's Moiety, free and discharged from the Fee-Farm Rent payable to the King's Majesty, and of 100 l. per Annum payable to *Henry Middleton* deceased, and his Heirs, and from all other Payments and Charges whatsoever. And also to *Elizabeth, Rebecca, and Benjamin,* and to each of them, her, and his Heirs, one full Thirty-sixth Part or Share of the said New-River Water of the King's Moiety; only they, and each of them proportionably to stand charged with the payment of the Fee-Farm Rent due and payable to the King's Majesty, and with the 100 l. per Annum to *Henry Middleton* and his Heirs, and with no other Payment or Charge whatsoever; and to his Son *Hesekiah*, and his Heirs, one full Thirty-sixth Part or Share of the said New-River Water, the said Share being part of the King's Moiety, to hold to him and his Heirs, with the Rents, Issues, and Profits thereof, from and immediately after his Decease, only proportionably to stand charged with the Payments of the Fee-Farm Rent, due and payable to his Majesty, and with the aforesaid 100 l. per Annum to the said *Henry Middleton*, and his Heirs; and also charged with 150 l. more towards binding out of his Brother *Benjamin* an Apprentice, when and so soon, as he shall attain to the Age of Sixteen Years, but with no other Charge or Payment whatsoever; And further devises, That in case any of his said younger Children, Sons or Daughters, shall happen to die before he, she, or they should attain the full Age of Twenty One Years, or be married, then and in either of the said Cases,

he

he did will and devise that Part or Share, with the Profits thereof, of him, her, or them, so deceasing as aforesaid, to the Survivor or Survivors of all his aforesaid younger Children, Share and Share alike, chargable nevertheless with the several Payments as aforesaid, but liable to no other Charge or Payment whatsoever: And all the rest of his Shares in the said *New-River* Water, he gives to his eldest Son *Hugh* and his Heirs, so that he permit the rest of the Shares to be enjoyed according to his Will, and discharge the Fee-Farm Rent, with which they are charged: And in case he shall not do so, he gives the said Shares, he should otherwise enjoy by the Will, to and amongst all other his Children, and their Heirs, equally to be divided amongst them.

Simon Middleton died seized the 20 July, 1679. and after his death, *Rebecca* having attained her Age of 21 Years, died. *Hezekiah* after seisin of his Share, died under 21 Years, and unmarried. *Anne*, one of the Five younger Children (which Five claimed the said *Hezekiah's* Share) by Lease and Release, settles the fifth part of the Share, late her Brother *Hezekiah's*, upon herself and the Plaintiff *Bennet Swayne* (whom she afterwards married) and after to the Children that should be between them. Remainder to the right Heirs of the Survivor of them two. *Anne* died without Issue; and *Bennet Swayne* after her death received the Profits of that fifth part of *Hezekiah's* Share, to the value of 20 l. That *Benjamin Middleton* was the only Brother of the whole Blood, and Heir of *Hezekiah*, Esq; &c.

Upon the arguing of this special Verdict, the Court below was of Opinion, That *Benjamin* was intitled, to *Anne's* Share of *Hezekiah's* Part, as he was Brother and Heir of *Hezekiah*: viz. That by the Will, the Fee-simple and Inheritance of a Thirty-sixth Part or Share of the *New-River* Water was given to, and vested in each of the younger Children; and that on the Death of *Hezekiah*, one of the younger Children, unmarried, under One and Twenty Years of Age, by the Clause (whereby the Shares of the younger Children dying before Twenty One, and unmarried, are given to the surviving Children, Share and Share alike) the five Survivors became Tenants in Common, and each was seized of a fifth part only for Life, and not in Fee: That the Reversion of *Hezekiah's* Share, expectant on the deaths of the younger Children, descended to the said *Benjamin* his Brother and Heir; and that he on the death of *Anne*, ought to have enjoyed that Fifth-part in Possession; and therefore the Profits of it received by *Swayne*, were due to *Benjamin*, and Judgment accordingly given there for *Benjamin*.

And now it was argued, That this Judgment was erroneous, for that by Virtue of the said Devise, the said *Anne* had an Inheritance in her part of *Hezekiah's* Share, for these Reasons, 1. It is well known and agreed, That a Part or Share in the *New-River* is an Inheritance, and therefore the Devise of all that Part or Share to any Person, is a Devise of that Part and

Share to such Person and his Heirs, and is as much, as if a Person being seized in Fee of Lands, should lay in his Will, he devises all his Estate in those Lands to J. S. it could be no question, but such a Devise would convey the said Lands to such Devisee and his Heirs. The Share of *Hezekiah* was given to him and his Heirs, proportionably charged with the payment of the Fee-Farm Rent to his Majesty, and with 100 *l.* per Annum to *Henry M.* and his Heirs, and also with 150 *l.* to his Brother *Benjamin*; and being thus charged, upon his dying before Age or Marriage, his Share, with the Profits thereof thus charged, is given to his younger Brother and Sisters, the Survivor and Survivors of them, Share and Share alike. Then it is observable, that the Fee-Farm Rent, payable to the King, his Heirs and Successors, is 500 *l.* per Annum; upon which account it would be very difficult to conceive, that the Testator, by this Devise of the deceased's Part, to the Survivors, Share and Share alike, did intend to such Survivors only an Estate for Life, when at the same time he subjects and charges it to and with the proportionable payment of the said yearly Fee-Farm, and the 100 *l.* to *H. M.* and his Heirs, which are Rent-Charges in Fee, and cannot reasonably be understood to be charged on Estates given barely for Life.

Besides, The Point here is upon the Construction of a Will, and the Testators true Intent and Meaning, in any part that is obscure, ought to be collected out of any other part or words of the Will that may explain it. Now, it being plain, that *Hezekiah's* Part was a Fee-simple, and thus charged, it seems to be as plain, that the very Inheritance of that Part, should upon his death go and remain to the Survivors, Share and Share alike; that is to say, That they should be Tenants in Common in Fee-simple of that Part, the same being thus chargeable with the two Rents, and with the 150 *l.* to *Benjamin*; for otherwise this Devise over (which was designed in their favour and for their benefit) might have turned to some of their Losses and Prejudice; for they might have paid the 150 *l.* to *Benjamin*, and have died, before they were re-imbursed out of *Hezekiah's* Share; had the same been only an Estate for Life; and it cannot easily be supposed, that he intended his youngest Children by the second Wife, should have a better Estate in his Shares of the *New-River* Water, devised as aforesaid, than the younger Children by the first Wife had, but that their Shares in it should be equal; but by this Construction, *Benjamin* by the second Venture must carry away *Anne's* Share from her Sisters and Brother of the first Venture; here's no need of the common Caution in construing Wills, not to disinherit an Heir by general words; for *Hugh* is disinherited by this Will, whether this surviving Interest be a Fee, or for Life. The Intention here was to make an equal Provision for all the younger Children; the Part and Share of the Person dying, is the Inheritance in the Part and Share of the Person dying in the *New-River* Water. The three Sisters were

to have their shares discharged of the Fee-Farm Rent; but if this be only an Estate for Life, then those who were designed to have the least benefit by the Will, are to have the greatest; for they are Heirs to *Heirs*; whereas the Children by the first Venter seem to be most favoured by the Will, because they are to have their Benefits free from those Incumbrances. The Testator severs his own Share in Two or so many Parts and Shares, and then devotes those Parts in Fee, how can this Clause of Limitation to Survivors be construed to mean other will, than that the whole Fee of that proportion should survive. The *Words* *to be divided* on the other side, are only Derivatives of the Land, and not of his Share.

Then it was said, That here was no Tenancy in Common; that 'tis true, equally divided, and equally to be divided, make a Tenancy in Common; but 'tis upon the account of the word *divided*; that two equally will not be so construed; *And* *as*, and if the words *equally* will not, why should *Share and Share alike*; these words do not show any partition of the Estate in Fee, nor in the Intention of the Testator, and one of these is necessary to prevent a Survivorship. Wherefore, upon the whole it was prayed, That the Judgment should be Reversed.

On the other side it was argued with the Judgment, That the same was Legal, and ought not to be Reversed; for that as to the last thing stirred, it must be a Tenancy in Common, the words *Share and Share alike* imply a Division, or Partition is effected or intended, and it hath always been so construed. The distinction between *divided*, and *to be divided*, hath been long since Exploded, as importing no difference.

Then it was argued, That here was only an Estate for Life given by this Clause to the Survivors; that a Devise of the Share is the same with the Devise of the Land, that the Share does not signify the Estate or Interest, but the Quantity or Proportion of the Thing; there are no words to vest the Inheritance in the Survivors; there are proper words to give an Inheritance to the Children; and there are no such proper words used to divest it out of them, and to give it to the Survivors upon the decease of any one of them under Age and Unmarried. The Share or Part can only be the Thing itself, not the Estate in the Thing; and 'tis all consistent, if it be adjudged an Estate for Life.

Besides, In the last Clause, when he enjoyns the Heir to permit the Devisees to enjoy their Interests, and in case he do not discharge the Fee-farm Rent, he gives the rest of his Shares to and amongst all other of his Children and their Heirs, equally to be divided among them. The adding of the word *Heirs* in this Clause, and omitting it in the former, shews the

Testator

Tellator to have a different meaning in the first, from what he had in the last.

Then were cited several Cases to prove that *totam illam partem* carried only the Thing devised, not the Interest which the Devisee had therein, 3 Leon. 180, 181. 3 Cro. 52. 2 Leon. 156, 56. and 1 Rolls Abridg. tit. Estate, 835, 836. 1 Cro. 356. Latch. 40. and as to the 150 l. appointed to be paid for to bind Benjamin Apprentice, was said, That the same was to issue out of the Rents and Profits. And therefore upon the whole, it was prayed, That the Judgment might be affirmed; and it was affirmed accordingly.

Ee 2 Dominus

further, That the Church being so full of the Incumbent, and Car. 1. so seized as aforesaid, the said Car. 1. by his Letters Patents, &c. bearing date at Canbury, 19 Julij, anno regni sui decimo quarto, quas idem Richardus hic in curia profert, ex speciali gratia, certa scientia, & mero motu, for himself, his Heirs and Successors, did give and grant cuidam Willielmo Theckston ad tunc armig' & postea militi the Advowson aforesaid, to hold to him and his Heirs to the use of him and his Heirs for ever; prout per easdem Litteras Patentes plenius apparet; by virtue of which said Grant, the said Theckston was seized of the Advowson in question, ut de uno grosso, &c. And he being so seized, the Church became void by the death of Wickham, posteaque ac eodem tempore quo superius in narr' pred' supponitur pred' Johannem Pierse usurpasse super pred' nuper Regem Car. 1. He the said John Pierse usurping upon the said William Theckston (to whom of right it then belonged) did present the said Metcalf, who was accordingly instituted and inducted, by which the said John Pierse was seized of the Advowson aforesaid, and being so seized, and the Church then full, he the said Theckston did by Indenture 18 April, 18 Car. 1. release to the said John Pierse, and his Heirs, all his Right, Title, Claim, &c. by which the said John Pierse became seized, and he dying seized, the same descended to the Defendant Richard, as his Son and Heir, by which he became seized, and then the Church became void by the Death of Metcalf, and continued so void for a Year and half, and more, and by that Reason, Car. 2. to the Church so void, per lapsum temporis in defectu Patroni Ordinarij et Metropolitanj jure Prærogative sue Regie eidem, Car. 2. devolut' did present Sawways his Clerk, who was inducted, and afterwards died; and the Church being so void, the Defendant presented one Scroop, his Clerk, absq; hoc quod pred' nuper Rex Car. 1. obiit scilicet of the Advowson aforesaid, in manner and form as the Attorney hath declared, Et hoc paratus est, &c. unde petit jud' et breve Episcopo, &c.

Scroop pleads the same Plea, mutatis mutandis.

The Attorney General craves Oyer of the Letters Patents, produced in Court, and they are read to him, and are to this effect: They recite, That Queen Elizabeth had by her Letters Patents, Anno 13. Regni sui, granted to then Earl of Warwick, all those Mannors of Bedall and Ascough, &c. and all Advowsons and Rights of Patronage thereunto belonging, &c. rendring a Rent; and that Jac. 1. had granted the Rent to Sir Christopher Hatton, et al. and that the said Mannors and Rents by good Conveyances in the Law had come to Sir William Theckston, Knight, and that he then had and held the same to him and his Heirs; then tis. Know ye, That we for divers good Causes, and Considerations, and of special Grace, &c. do ratifie and confirm to him the said William Theckston and his Heirs, &c. all those, &c. then it follows, That whereas the said William Theckston, by

Virtue

Virtue of the said Letters, Patents, made to the said Earl of Warwick, and lawful Conveyance of the Premises to himself made, doth claim to have the Advowson of the Church of Bedall aforesaid, according to the Tenour and Intent of the said Letters, Patents; and whereas by the said King Geo. 1. upon the Death of one John Perry, had by law presented Wilson, and after his Death, the said Throckton claiming the Right of Presentation, the said King *ad istam Ecclesiam se vacantem (ut ad presentationem suam plenè interesset)* had presented Dr. Wickham, and that the said Throckton, to recover his Right, had brought his Writ of *Quare Impedit*, upon which Issue was joyned; That afterwards it was agreed between Throckton and Wickham, that Wickham should enjoy it during his Life, and that Throckton and his Heirs should have it quietly for ever after, *prom ex informacione dicti Wickham nostri Capellani in ordinario acceptis; Nos ipsius volentes*, That the said Presentations of the said Wilson and Wickham, or either of them, or their or either of their Institution and Induction should not hurt the said Throckton's lawful Right of presenting to the said Church for the future; and it is our further Intention, That the said William Throckton, his Heirs and Assigns, shall freely and peaceably have and enjoy the said Advowson of the said Church of Bedall, according to the Tenour and true Intent of the said Letters, Patents, granted by the said Queen to the said Ambrose Earl of Warwick, any Defect or Defects in the said Letters, Patents, notwithstanding.

And then follows the Grant it self in these Words, *Scitis quod nos ex uberiori et speciall gratia nostra*, &c. Know ye therefore, That we of our more abundant and special Grace, and of our certain Knowledge and meet Motion, have given and granted, and do by these presents, for our selves, our Heirs and Successors, give and grant to the aforesaid William Throckton the Advowson, Donation, free Disposition, and Right of Patronage of the aforesaid Church of Bedall, and all our Right, Estate, Title, Interest, and claim whatsoever of presenting to the said Church, whensoever or howsoever it shall become void: *Quibus rebus & iudicio*, the Attorney General demurs, and the Defendant joyns; and Judgment in C. B. *pro Domino Rege*, upon this Reason only, that this Grant was void, the Advowson being in gross, and nothing was intended to pass but an Advowson Appendant, and so the King was deceived; and upon a Writ of Error in S. R. the Judgment was affirmed upon another point, *viz.* That the Grant pleaded was to William Throckton, then Esq. and afterwards Knight, and the Grant set forth upon Oyer, was to William Throckton, Knight; and there were Three Judges of Opinion with the Patent, and one only against it; and one Judge of Opinion with the Plaintiff in the Error, as to both the Validity of the Patent it self, and the Identity of the Person named in the Plea and Patent.

And

853. thus it was in the time of Hen. 2. then after Surnames came to be used, this Title of *Miles* was also used wth an Addition or Inlargement after the Surname; *Camden's Tracts of Surnames* in his *Remains*; and *Kenilworth's Parochial Antiquities* lately Printed at Oxford. In 4th edth of these said, That the Title of Knight came after the Surname as an Inlargement, not in lieu of it; as *Machant Mercer*, &c. Professor wth Divinity, Law, Medicine, Master of Arts, &c. for further Distinction sake. Then it was said, That this use of Surnames holds not in case of Bishops, Dukes or Earls, for they add only the Place, and therefore the Descent or Accession of the Honour, comes instead of the Surname, so is *1st Inst.* 386. but now *William Throckmole*, when made a Knight, he remains *William Throckmole* still, he loses no part of his former Name, and the same be enlarged; if it had been otherwise it would have merged the Surname, but his Title makes no Alteration therein at all. The Law doth require a Man to be named only by his Christian and Surname, unless somewhat comes in lieu of the last, or the first be altered by Confirmation; a Grant is good, if the Party be so described, as that he may be known, tho' there be a Mistake in it, yet is good, as a Grant to an Earl or Bishop by a wrong Christian Name, hath been held; *Ross v. Al. Th. Grant*, 44. *Dyn.* 376. in the Identity of the Person, which the Law doth most regard and value; and therefore, since there was no pretence, but that the same Person who granted it to *Pierse*, was intended by and to the King's Parent; it was hoped, That such a Nicety should not lose the Subjects Inheritance in this Advowson, which he had bought for a valuable Consideration. Further it was said, this could not hurt upon the Oye of this Grant in this Record, as this Case stood, and should be further shown anon.

Then it was argued, That either will the Case upon the Declaration and Plea alone, or else it stands upon the Letters Patents alone; either of these two ways, as with the Subject: If the Patent be considered, it is self, there's nothing appears to make it void, the King had a Power to grant, and there are Words sufficient to pass it. Then consider the Declaration and Plea, there's a good barr to the Title laid in the Declaration; so that the only Objection can be upon the Rules of pleading, as it stands all together, and the Query is, if P. hath owned or confessed any such thing as is pretended of a Seisin in goods, in *Elm.* *mons.* and if it be admitted, whether the King can take an Advantage of the Variance between the Patent set forth on Oye, and that which is pleaded, the same being only pleaded by way of Inducement, whether the King can waive his own Title, and question the Defendants in this Case.

As to the first, it was said, That this Grant was not void by reason of any such Admission, the King declared his full Intention, That Sir *William* should fully and freely enjoy this Advowson,

vowson, any Defects to the contrary notwithstanding; that 'tis not admitted in this Case to have been an Advowson in gross, in the 12th of Q. Eliz. no such thing doth appear; and then the Grant of Car. 1. is good; and if it did so appear, yet the Grant is good. The Plea doth say, that Car. 1. came to it by Descent, but that doth not admit her seized in gross: That Allegation in the Declaration is near Surplusage and Immaterial, and cannot hurt the Party which makes it, tho' contradictory to, or inconsistent with his Title: Nor can it benefit the other side to deny it; for if he had denied it, it could have done him no good; and consequently to admit it, shall not hurt him. Now 'tis not necessary in a *Quare Impedit* to alledge a time of Seisin; a Seisin generally in time of Peace is enough; then the not denying, admits only what is materially alledged. Suppose the Defendant had pleaded *absque hoc*, that Queen Elizabeth did present Tymmes *modo et forma*; and it had appeared upon the Trial, that he was presented in the 43d Year of her Reign, it must have been against the Defendant. Even, where time is required to be alledged, another time may be proved, as in Trespass, Battery, &c. The most that can be pretended to, is, that here is an Admission of her being seized in gross after the Grant to the Earl; and it might be appendant then, and afterwards got to the Crown by Presentations; there's no colour to suppose an admission of the time. *Hob. 71.* The Case of *Sherly and Wood*, and 2 *Leon. 99.* prove that neither alledging or confessing a thing immaterial shall hurt; the Reason is the same for both.

There was a plain Artifice in this Pleading; the Declaration mentions a Presentation, *prout per Inrolment*, which cannot be, unless in the same Court; otherwise you must plead an Exemplification, *Wymock's Case, 5 Rep.* If the Declaration had been in the common usual way, setting out the Queen to have been seized generally, or to have presented generally, there had nothing appeared to have hurt this Grant; for it might then have been appendant; and if it might be so, it shall be intended to be so; for he is not bound to aver it to be appendant; for upon *Oyer* every thing shall be intended to make a Grant good, unless the contrary doth appear, 2 *Cro. 679.* he need not plead, that it was appendant at the time of the Grant to the Earl; *Concessit* is enough, and that tho' in general words, 35 *Hen. 8. Bro. Pleading 143. Kelway 43. 1 Rolls Abridg. 405.*

Then suppose it did appear that this Advowson was not appendant in the 13th *Eliz.* yet it doth pass: There is but one supposed Falsity, and that is Dr. *Wilson's* Presentation by Lapse, which is admitted to be *pleno jure*; First, The Grant is full, express, and large enough, *Know ye therefore, &c. All our Right, &c.* as full words as can be used, without any restriction whatsoever. And as to the Suggestions, there's not any Mistake in them: 'Tis not suggested that 'twas ever appendant; not suggested that it did pass by those Letters Patents; nor that it came to *Th.* but only that he claimed it; and the word *claim* doth not always import a lawful Claim;

for a Man is amerciable *pro falso clamore*: Here's as much Caution and Care in the penning of these Letters Patents as was possible, nothing but what is exact.

Suppose a Man doth claim an Advowson by a void Grant, and he brings a Writ, after the King hath presented; and the King says, *Let my Clerk have it quietly for his Life, and you shall have a Grant from me, and shall be secure of all my Right for the future*: 'tis not said, that 'twas Sir William's Presentation, but he sued a Writ so describing it.

'Tis admitted by *Car. 1.* that this Patent might be void, yet it was his Intention that *Tb.* should have it for the future: This Intention is as plain as words can make it; that he and his Heirs should for ever enjoy it, notwithstanding any defect in the Patent of *Q. Eliz.* 'Tis not only to restore an old Title, and make reparation for the wrong done by the King's Presentation, but in Case the old Title were defective, to make and give to him a good one: If it appears that the King's Intention were for passing it, it shall pass, notwithstanding a Mis-recital.

Suppose the Grant had been recited at large, and no more had been said but the King confirms it, would not that have been good: Then was cited the Earl of Cumberland's Case, 8 Rep. 166. the word therefore is in that Case too; yet because full words are superadded, it shall not be qualified by the Deed recited, and that is a much stronger Case than this: *Hill. 22 & 23 Car. 2.* Sir Robert Atkins versus Holton, 'tis in *Ventris*. And the pleading in *Vidian's Ent'*. agreed that King John's Patent was void, and King Edw. must have been deceived in his Grant, and his Intention might be there said to be only to make a Restitution. And a false Inquisition turns a Man as much out of possession of a Franchise, as the King's Presentation doth out of a Patronage; but held there, that tho' King John's Grant was void, yet that of Edward was good, because the words were full and General, and the King shewed his intent that the Party should have the thing. But the other side have objected, That this is a qualified Intention according to the tenor of the first Patent. To which it was answered, That the King did suppose that Patent to be defective, and his true intent was that *Tb.* should have the Advowson. Besides, tho' it were in gross, yet it might have the reputation of being appendant, and it was the King's meaning to pass it, 6 Rep. 63. a small matter will make a reputation of an Appendancy. If a Man mortgages his Mannor, excepting the Advowson thereto belonging, 'tis become in gross; but when the Condition is performed, and the Deed avoided, 'tis appendant again; therefore it might be thought appendant; it might be some accident, which did sever it from the Mannor; yet if it had the reputation of being so, it might be within the King's intent to pass it, tho' it did not pass by the first; 'twas intended that some Advowson should pass, and here are exprefs words to pass this: In *Coke's Entries* . . . *Quare Impedit*, it appears that this Advowson of *Bedall* was appendant.

It further appears by History, That this *Simon Digby* had committed

mitted Treason, before the Church was void ; and before Attainder the Queen presented, that made it in gross, then the Attainder makes it appendant again ; then tho' it might be possible that the Queen was seized in gross, yet if it were so, upon *Digby's* Attainder she was seized of it as appendant ; now if any thing might make it appendant, 'twill be hard to construe it void, where, for any thing that doth appear, it might be good. Such Declarations so subtle may ensnare any Defendant, and take away any Man's Inheritance. The Attorney should have taken Issue upon the Traverse, and that would have brought the whole Matter in question.

As to the mistake about *Wilson's* Presentation, that cannot vitiate against an express intent ; the King's design was to determine the difference between his Incumbent and another ; he would not have his Right in this Benefice to be questioned or disputed ; for otherwise, there was no reason for *Th.* to take a Grant to avoid Controversie, and yet that new Grant to leave him in as bad or worse Condition ; here's both Confirmation and Grant ; and if so, what matters it, whether *Wilson* were presented one way or the other. *Th.* could not have been in a worse Condition, if he had miscarried in his Writ, the King designed to him all the Right which he had, and otherwise he was at the charge of procuring Letters Patents, to no other purpose then to be deceived. Besides, here was a good Consideration, tho' *Th.* had no right : a Surrender of void Letters Patents is a good Consideration : 1 *Rep.* 143. *Altonwood's* Case, and 5 *Rep.* 65. *Lord Chandos's* Case ; the King there thought himself seized by virtue of the Surrender, which he was not, yet held good ; so that 'tis not every Mistake that will avoid a Grant, when the Intention appears, 1 *Rolls Rep.* 23. Therefore if there may be any thing given in Evidence, which might support these Letters Patents, they shall not be adjudged void upon *Oyer.* : and to make these void of *Car. I.* they must construe those of the Queen void ; and these cannot be adjudged void, because they are not before the Court ; Letters Patents recited were never adjudged illegal ; for notwithstanding this recital, there might be more words in them, which might make them good : 'tis *inter alia*, suppose it had been *speccant* or *existent* in *Bedall*, that would have passed the Advowson in gross : 'Tis not inconsistent with any thing said in this Patent of *Car. I.* to say that the other of Queen *Elizabeth* contained or passed more, *Mod. Rep.* 194, 195. *Hardres* 231. the *igitur* is only *nota continuationis*, and doth not always suppose all that's precedent to be the Consideration, it can't well begin a Deed, and that is all : 'tis *Exuberiori gratia*, &c. 3 *Leon.* 249. 'Tis impossible to suppose or use more comprehensive words then in this Case, and therefore it was inferred that these Letters Patents of *Car. I.* were good.

Then it was argued further with the Plaintiff in the Writ of Error, that in this Case Mr. Attorney can take no advantage of either of these Mistakes in the Defendant's Plea, if they are such ; for that 'tis only Matter of Inducement ; and the Letters Patents needed not have been pleaded with a *profert hic in curia*, and therefore cannot hurt ; If the Inducement be good to maintain the Traverse

or make it material, that's enough; but still the Inducement is not traversable: 'Tis true, that generally speaking, a Deed or Grant after *Oyer* becomes part of the Plea, but still 'tis only Inducement. If a Defendant confesses and avoids, the Plaintiff shall not depend upon that which he confesses, but answer that whereby he avoids the Plaintiff's Title or Charge: This is no more then if they had traversed the Grant, which they could not do. In the Case of a common Person, suppose the Defendant's Title not full, yet if he traverses the Plaintiff's, that's enough: Form requires an Inducement to a Traverse, but the latter is only material for the Plaintiff to answer to; for nothing can be traversed, but what is material; now why should it not have been a good answer to their Declaration, to have said that *Car. 2.* presented by Lapse, *absque hoc* that *Car. 1.* died seized; for by this the Seisin or Presentation of *Car. 2.* had been avoided; and there's nothing else material in the Declaration; for the Seisin of Queen *Elizabeth* and *Jac. 1.* are not to the purpose, and if answered by the Defendant, it must have been against him, there had been a good Title for the King without it: then supposing it necessary to shew how it came out of *Car. 1.* the Attorney General can only take Issue on the Traverse of his dying seized; for that denies the whole Title that is material to be answered to: Now whatsoever shews that the Plaintiff hath no right to the thing in demand, is a good Plea, let who will have the true right: The true Title upon this Declaration is that *Car. 1.* presented, and thereby became seized, and died seized, and the denying him to dye seized, is a denial of this Title; for if *K. Car. 2.* did present by Lapse, and *K. Car. 1.* did not die seized, 'tis with the Defendant; no Man is bound to answer that, which if he do, 'twill still be against him; but if a Man makes such an answer, as if true, the present Plaintiff hath no Title, 'tis enough: Then if it be true that no Right descended from *Car. 1.* to *Car. 2.* and that *Car. 2.* presented only by Lapse, what Right can his present Majesty have: and all this is confessed by the Demurrer, if well pleaded; and 'tis no Objection to say, that the dying seized ought not to be traversed, but only the Presentation; for that is a mistake; in case of Land 'tis good; and an Advowson is an Inheritance descendible in like manner, and Mr. Attorney thinks it a good Traverse; for he all along in his Declaration, alleges a dying seized from Queen *Elizabeth* downward: and there are several Precedents thus, *Winch's Ent.* 661, 662. and *Winch.* 912, 686, 692. and *Burkley* and *Symonds*, *Winch.* 911, 912. is of an Advowson in gross; and in the same Book 35, 39. are thus: A man may die seized of an Advowson, as well as of Land; and if he doth not dye seized, it doth not descend; and the Seisin in gross is not to be traversed, as is 1 *Anderson* 269. and *Hob.* 102.

Then 'twas said that the true Reason and Nature of a material good Traverse is well explained in *Vaughan's* first Case of *Tyson* and Sir *Rich. Temple*, and 1 *Saund.* 21, 22. and it is this, especially in a *Quare Impedit*. If any thing in the Count be travers'd, it must be such Part, as if true, is inconsistent with the Defendants Title, and

and if false or found against the Plaintiff, doth absolutely destroy his Title; nay, if the Traverse leaves no Title in the Plaintiff, then 'tis good, whatsoever comes of the Defendants. Then the Difficulty is, If the King by his Prerogative may waive his own Title which is traversed, and insist upon the Deficiency of that which the Defendant alleges; and in the Case of the King and the Bishop of Worcester, and Jervis, in *Vaughan* 53. there 'tis said, That the King ought to maintain his own, and not to question the Defendants; he cannot desert that which he hath alleged for himself, and fall upon the Defendants Title; and Reason warrants such Rule, for (tho' the King hath no Damages in a *Quare Impedit* notwithstanding his laying it *ad dampnum*, *Hob.* 23. yet) the Suit supposes an Hindrance and Damage to the King, and if the Right be not his, he hath no Cause to complain of the Defendant, tho' another hath: Every Man is to recover by his own Strength, and not by the Weakness of the Defendants Pretensions; and if the Law be thus, then how can Mr. Attorney-General take Advantage of this upon Demurrer after *Oyer*, for now upon *Oyer* 'tis, as they say, become Part of the Defendants Plea, and consequently it must be part of the Inducement; and if so, he ought in that Case, to have taken Issue upon the Traverse, which denied his Masters Title: Wherefore, upon the whole Matter, it was prayed, That the Judgment should be reversed.

On the other side, 'twas argued for the King, That this Judgment ought to stand; and as to the last point, 'twas said, That taking it for granted, the King could not traverse any Point of the Defendants Plea; yet certainly he might demurr upon the whole, in case it were insufficient; That now *Oyer* was craved, and had, the Deed did become part of the Defendants Plea, and must be taken as such; That (tho' there had been no need of a *Proffert*, yet when 'tis produced, 'tis such as he hath pleaded, and upon the whole, the Court is to judge, there being a Demurrer; That as the Case stood, the King might take advantage of both the Exceptions; That the Declaration of it self was good, and if the Plea be naught, the King ought to have Judgment for him; That every Plea is to be taken most strongly against the Party that pleads it; That here the Defendant had admitted *R. Car. 1.* well seized, that he ought to shew it out of him, otherwise the Plea was ill, that every Traverse must have an Inducement; That if upon the whole Plea, it did not appear that King *Car. 1.* parted with this Advowson, 'tis naught; That if by the Partles own shewing, it was manifest to the Court, That the King continued seized, and what he doth further shew, no ways contradicts it, he could not traverse the dying seized, and therefore a Demurrer was most proper; and consequently, upon this Demurrer, they were let in to affirm, that nothing passed from the King by these Letters Patents of *Car. 1.*

Then it was argued, That this Grant was void, because it was to a Person then Esq; that *Tunc Armilger*, can have Reference only

only to the time of the Letters Patents, that a Man cannot be a Knight and an Esq; at the same time, that Knight is part of his Name, and the Title of Esq; is drowned in that of Knight, that the old Books are thus, 7 Hen. 4. 7. 14 Hen. 6. 15. 21 Edw. 4. 72. 2 Inst. 594. 666. Hist. 41. Bra. Tit. nosse. 33. 1 Cro. 372. That 'tis true, if a Deed of Feoffment be made to a Man by a wrong Name, and Livery be thereupon had, 'tis good; but all the Books make a difference between that Case, and where it is by Deed, where the Operation is altogether by Deed: Then was cited the Earl of Pembroke's Case, in Littleton's Rep. 181. and in Jones, 215, 223. the Court went upon the Reason, that the Jury found him to be the same Person, Littob. 161. there they would intend him an Esq; at the time of the Commission, and a Knight at the time of the Return, and it was for Necessity sake, for to prevent the avoiding of so many Trials, as had been upon that Commission.

Lord Ewer's Case, 2 Cro. 240. there it was held well enough, because sufficiently described; so in a Grant, if it cannot be intended otherwise than to the same Person, there 'tis well enough; but here they can never be the same. In Case of an Earl or Bishop, there 'tis understood, who is meant by the Description, there can be but one of that Title; but here the Plea saith, That he was not a Knight at the time, and Sir Thomas Ormond was attainted by the Name of Thomas Ormond, Esq; and ill for that Reason, 2 Rolls Abr. 43. 198. Dyer 150. 1 Leon. 159. 160. the highest and lowest Dignity are universal, and the same in every Kingdom, 7 Rep. 16. 201 Edw. 4. 6. can any body say upon this Grant, That the King intended to pass this Allowson to a Man, that then was only an Esq; Selden. 682. the Addition of Esq; is drowned and merged in that of Knight, and Selden was a very competent and good Judge of this Matter: Then it was said, that the only way to save this, which had not been urged for the Plaintiff, was, that he might be reputed a Knight, and a Name of Reputation will be sufficient to take by, and to this it was answered, That he who is reputed a Knight, and is none, cannot take by that Name: And besides, if he could, it should have been pleaded by a *per Nomen*; in case of a Bastard, the Reputative Name must be shewn to make the Grant good; the Degree of Knight was formerly of Esteem in the Law, as upon a Writ of Right, if the Wife be joyned; and if a Peer be Party to any Issue at Law, triable by Jury, &c. As to the Objection, that a Grant to one by a Name of Dignity, which he really had not, viz. The Eldest Son of a Duke as a Marquess, and that a Grant to him by that Name is good, 'twas answered, That there was a real Reputation, he takes place after all, real Marquesses as a Marquess by the Rules of Heraldry: There's a ground for it, from the Precedency given him by the common Use and Custom of the Realm, and they are named so now-a-days in Deeds, but anciently Conveyancers were more Cautious, and named them Esquires commonly called Marquesses; and even now, careful Men call them

them eldest Sons of such Dukes, &c. If a Reputation would have done it, the pleading should have been with a *Cognit' et Reputat' per Nomen*: It is the name which intitles the Grantees to take, and otherwise they have no pretence to claim by such Letters Patents, no more than *John* or *Thomas Theckston*; and if the Person hath any other Name of Reputation, that ought to be shewn, wherefore it was hoped, That this was cause enough to affirm the Judgment.

Then it was argued, That this Grant was void as a Grant of an Advowson appendant, when upon the Record, it appeared to be an Advowson in gross; that the Defendant had admitted it an Advowson in gross, in Queen *Elizabeth* that he hath not only admitted, but confess'd it in almost direct terms, by saying, *Bene & Verum est*, that *Car. 1.* became and was seized in manner as in the Declaration; this is a full Confession, That the Queen was seized in gross, 'twas said to come to that King by Descent, and so there is no room left for Presumption or Intendment, that it was by any wrongful or other Seisin. Then 'twas urged, That nothing passed to the Earl of *Warwick*, because not appendant, but in gross, and for this was cited *Moor 45. Hob. 322, 323.* and other Books, so that it doth not appear, that the King did intend to pass this Advowson; for in the Grant to the Earl of *Warwick*, there's no Grant of it by any express Name, which its probable would have been, had the same been intended; now to suppose it appendant, is to suppose against the Record, against both the Averment in the Count, and the Confession in the Plea, 'tis in general Words, *una cum Advocationibus*, &c. nor does it pass by the Letters Patents of *Car. 1.* because it did not pass to the Earl, by those of Queen *Eliz.* this Grant is ushered in after all the Recitals, and those suppose the Advowson to have passed by the first; *Igitur*; wherefore, it must be upon Consideration of what is before alledged, this is at least an illative Word, and cannot begin an independent Substantive Clause of it self; so is *Uterius*, 2 *Browt. 132.* If this Granting Part should be taken to be Substantive, and to have no Reference to what is precedent, all those Recitals would be vain and insignificant, and the King might as well have begun with the Words of the Grant. The King's Grants are to be taken according to his Intentions, and those are to be expounded by the Recitals; then were quoted many Cases, as 5 *Rep. 93. Hob. 120. 203. Hutt. 7. 2 Rolls Abr. 189. 11 Rep. 93.* and it was said, That here are many false Recitals, Sir *Will. Theckston* claims, that must be intended a lawful Claim, whereas he could not lawfully challenge any Right to this Advowson; That the King presented *Wilson* by lapse; The King was deceived, in thinking that this passed to the Earl; The Agreement between Dr. *Wickham* and Sir *William Theckston*, was only to deceive the King: Here's no notice taken of the Advowsons being in gross; The Quality and Nature of the Advowson is totally concealed from the King; the Words notwithstanding any Defect, helps only want of Form; here

Here was a plain Artifice in the Matter; in Queen Elizabeth's Grant, it was Advowsons in General, &c. but when Car. 1. is to confirm that Grant, 'tis of that Church by Name; all the intermediate Recitals between that of the first Grant, and the words of this new Grant, are dependent on that first: The King's Intention; That *Theckston* should have it, is not absolutely, but *secund' Tenorem & Intentionem* of the former Patent; the King meant only to restore to him his old Right which he had by that Patent, notwithstanding the Presentations, 10 Rep. 116. all Facts recited in the King's Grant, shall be intended to be of the Suggestion of the Patentee. If there be several Considerations, and one false, and the King deceived thereby, it shall viciate the Grant, 3 Leon. 249. *Vors* Case cited in *Legates* Case; *Fitt. Tn. Grant*, 58. 3 Leon. 119: If the Granting Words had stood alone, the Case had been more doubtful, but here they are all coupled. In all the King's Grants, there must be some Considerations for his Favour, and abundance of Cases were quoted concerning the King's Grants, Misrecitals, false Recitals, and Deceit, &c. Then it was strenuously insisted upon, That the Recitals and the Granting Clause, must be consider'd and judg'd of together; that the contrary Opinion, is to make the Granting Part to be without any Consideration; 'tis to have a Conclusion without Premisses, *in igitur* without a Cause; That *eadem servitia* can never be intended new ones; That *secundum tenorem* must refer to the Appendant Advowson, and therefore the Advowson in gross here declared upon and pleaded to, can never pass by this Grant, and upon the whole it was prayed, That the Judgment might be affirmed.

It was replied on behalf of the Plaintiff in Error, That as to the Variance in the Title of Knight, no Answer had been given to the reasonable Distinction between the Case of Grants, and that of Writs and Indictments, that here was no Proof or Appearance of a Diversity of Persons; That as to the Grant it self, *secund' tenorem*, could mean only a Reference to the Interest or Estate granted by them, not to the thing or the Nature of it; That such Words signified only, as fully and largely, they had no express Relation to the Quality of the Advowson, whether in gross or appendant; That by such Niceties, any or most Patents might be avoided, That Grants of Honours as well as of Interests, if questioned, must be under the same Rule; and the Considerations upon which they are grounded, may be subject to Inquiry, if true or false, &c. That the Patent of it self, without Reference to the pleading was good, That the Judgment desired, was to condemn a Patent as void, because another Patent recited in it was so, which perhaps was not fully recited; and if it were, was not in Judgment before the Court; and the substance of what was urged before, was in short repeated, and prayed, That the Judgment might be revers'd, and it was accordingly revers'd; and Mr. *Pierse* (*Scroope* being dead) presented *Francis Pemberton* his Clerk, who was admitted, instituted and inducted, &c.

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